

No. 16388 ✓

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

— See Also  
3107  
GRACE & Co. (Pacific Coast), a corporation,

*Appellant,*

*vs.*

THE CITY OF LOS ANGELES, a municipal corporation,

*Appellee.*

## OPENING BRIEF FOR APPELLANT.

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FILED

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*Appellee.*

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## OPENING BRIEF FOR APPELLANT.

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### Jurisdictional Statement.

This is an action for damages for injury to plaintiff's property sustained while in a dockside shed operated by the defendant The City of Los Angeles [R. 57-73]. Original jurisdiction is vested in the district courts by 28 U. S. C. A. §1332.

The District Court of the United States, Southern District of California, was the proper court to entertain this action since both defendants originally named are residents of that district. (28 U. S. C. A. §1391(a) and (c)) [R. 8, 57].

The United States Court of Appeals for the Ninth Circuit has jurisdiction of this appeal pursuant to 28 U. S. C. A. §§1291, 1294(1). No direct review by the Supreme Court may be had in this case.

### Statement of the Case.

Appellee, The City of Los Angeles, operates a building on one of its docks in Los Angeles Harbor. The building is used to receive cargo before loading on ship-board, and after discharging from vessels coming to this port. In other words, it provides the short term warehousing facilities of an ordinary marine terminal. The City collects a charge for this service, and maintains all facilities.

During the night of March 11, 1956, or the early morning of March 12, 1956, a water pipe beneath the dock failed because of corrosion. The water rose up onto the deck floor of the dock and damaged the goods of various individuals, including those of the appellant Grace & Co. (Pacific Coast).

This action followed. Originally, Outer Harbor Dock and Wharf Co. was also a defendant and had a third party complaint against Grace Line, Inc. However, prior to the conclusion of the trial, the action against Outer Harbor Dock and Wharf Co. was dismissed, and the third party complaint over, in turn, was dismissed, leaving only the action between The City of Los Angeles and the plaintiff.

The Complaint charged (in some detail) negligence in the maintenance and operation of the facility. It also charged misconduct bordering on intentional harm, since the pipe was knowingly allowed to remain in a dangerous condition with knowledge of the presence of valuable goods in the warehouse above. All of these allegations were denied by Answer. No substantial factual conflict developed at the trial (which was on the issue of liability only).

The pipe had been installed in 1914, and this failure occurred in 1956. All of the experts agreed that the failure of the pipe was caused by corrosion; all agreed that the particular area involved was characterized by a highly corrosive soil. The highly corrosive condition of the soil was also shown on maps prepared and possessed by the City. All agreed that cast iron has a bad record of frequent failure in such soil, so that such failure was to be expected at some time in some portion of the line; all agreed that cast iron pipe is not, today, installed under such conditions. Estimates of twenty to twenty-five years as the probable life of such pipe in such soil were given by experts for both parties (a life which the pipe had long passed).

It appeared without conflict that there was a substantial unaccounted, unexplained, and uninvestigated loss of water through this pipe for several months prior to the failure.

The testimony was also without dispute that The City of Los Angeles had adopted, to quote the Trial Court, a "do nothing policy" regarding inspection and replacement of its water lines. Its policy was simply to replace cast iron pipes only when leaks became so bad that water appeared on the surface, even where, as here, the pipe is of a type known to be unsuitable for the soil involved.

The Court reviewed these facts in a Memorandum Opinion, describing the hazard as follows [R. 84]:

"At the time of installation defendants did not know of the corrosive nature of the soil, but subsequent to the installation the City, or some of its departments, became cognizant that the soil in the harbor area was highly corrosive."

The Court also recognized that the policy of the City was to do nothing in the face of this hazard. It observed [R. 84]:

“Based upon economic considerations, defendants established a policy of doing nothing about maintaining, repairing or replacing such water pipe-lines until a leak occurred and water was discovered on the surface of the ground.”

The Trial Court concluded that there was no obligation to do anything, observing [R. 93]:

“Although it might have been desirable to make an inspection of the water lines every two or three years, such inspection would be prohibitively expensive and economically unfeasible. The City, like individuals, is required to take only reasonable precautions.”

Although phrased as a statement of obligation to take “only reasonable precautions”, this was in effect a conclusion that there was no obligation to do anything. There was uncontradicted evidence, to which the Court made no reference, that the laterals beneath the buildings could have been replaced inexpensively, and should have been so replaced when it became known that the soil was highly corrosive of cast iron pipe. Having rejected the idea of an obligation to inspect, and passed over in silence the contention that the pipe should have been replaced, the Court recognized no actual obligation to take any precautions.

Findings were prepared by appellee’s counsel, and executed over objections by appellant. These findings covered the subject of duty more fully. It was found expressly that the City had a policy of not maintaining the pipe lines. The Court also expressly found *untrue* plain-

tiff's allegations that the City was under a duty to provide a safe place for this merchandise.

In summary, the evidence and the Opinion note the existence of a danger to plaintiff's goods, with respect to which no action was taken. The Opinion and Findings dispose of liability on the basis that there was no duty to do anything, hence no negligence.

In our view, the principal question will be—What is the duty of the City?

### Findings.

#### (a) Explanation.

The Findings are next set forth in this statement of the case. Many of the findings consist simply of findings that certain paragraphs of the Complaint are untrue. Other findings are that designated portions of the Complaint are true, and *all other* allegations are not true. The allegations so found to be untrue are generally crucial to a determination of the duty of the City to plaintiff. In order to have the findings that these allegations of the Complaint are untrue before the Court in intelligible fashion, we have placed the words of the Complaint so found to be untrue in brackets, preceded by the words, "it is untrue that", or similar suitable language. We have italicized this interpolated language.

#### (b) The Findings Themselves.

1. Plaintiff Grace & Co. (Pacific Coast) is a corporation organized under the laws of the State of West Virginia and duly qualifed to do business in California. Defendant The City of Los Angeles (hereafter called "City") is a municipal corporation existing under the laws of California.

2. The Court has jurisdiction herein by virtue of Section 1332 of the United States Judicial Code and Judiciary by virtue of the fact that this is an action between citizens of different states of the United States involving in excess of \$3,000.00 exclusive of interest and costs.

3. At all times mentioned in the Second Amended Complaint the City owned and operated, by and through its Harbor Department, [but did not exclusively maintain] a steel and concrete shed at Berth 59, Pier 1, Los Angeles Harbor, in that portion of Los Angeles County known as San Pedro; said shed was used for the receipt and shipment of goods to and from Los Angeles Harbor. [*It is not true* that the City operated the said shed for hire, for the receipt of merchandise in transit from various portions of the United States and of the world to various other portions of the United States and the world. *It is not true* that said shed now is and at all times mentioned herein was used to store goods brought to Los Angeles by ship while awaiting delivery of the same to the owners hereof.]

4. \* \* \*

5. The City, by and through its Harbor Department, at all times herein mentioned, maintained in the public street adjacent to the shed at Berth 59 an eight-inch cast iron water pipe and an eight-inch lateral therefrom leading to said shed. Said pipe and lateral were installed by said Harbor Department about 1914 and at about the same time said shed was constructed by the Harbor Department of the City. The purpose of said pipe line and lateral was solely to furnish fire protection to the shed, its loading dock, its wharf, to ships moored at the wharf and to other property and appurtenances in the nearby vicinity.

[*It is not true* that the City at all times herein mentioned exclusively owned, operated or maintained an eight-inch cast iron water pipe installed beneath said shed.]

6. \* \* \*

7. Plaintiff on March 12, 1956, was presumptively the owner of approximately 1960 bags of coffee which had been stored in said shed at Berth 59 after having been discharged by various vessels and was awaiting delivery to plaintiff. The Court makes no finding concerning the ownership by plaintiff of any specific quantity of coffee for the reason that the trial herein was limited solely to the question of the liability of the City. Hence it was assumed only for the purpose of determining the question of liability that plaintiff owned 1960 bags of coffee.

[*It is not true* that said coffee bags were the product of various South and Central American countries or that said coffee had been discharged a short time prior to the event involved here. *It is not true* that said bags of coffee were placed in said shed at the joint and in common invitation of defendant Outer Harbor and defendant City and for the benefit of both said defendants, pecuniarily and otherwise.]

8. The City owned a cast iron pipe, as more specifically found in paragraph 5 hereof. [*It is not true* that the City in its capacity as (a) owner of said shed and said eight-inch cast iron water pipe, (b) landlord in possession of said shed and said eight-inch cast iron water pipe, and (c) as a marine terminal operator jointly and in common with defendant Outer Harbor, owed a duty to plaintiff to provide a safe shed for the interim storage of plaintiff's goods and to maintain said shed and said eight-inch cast iron water pipe in a safe and sound condition so as to prevent plaintiff's goods in

said shed from becoming lost or damaged by the entry of water into said shed.]

9. \* \* \*

10. Defendant City did not carelessly or negligently or otherwise omit or fail to provide a safe shed for the interim, or other storage, of any of plaintiff's goods [*by reason of any of the following facts*] or for any other reason:

[ (a) The floor of the said shed provided and used for such purpose by said defendants was of concrete which was poured on top of and which was dependent for support on a dirt fill which was over said eight-inch cast iron water pipe.

(b) Defendant City adopted and at all times herein mentioned pursued a policy with respect to the maintenance of said eight-inch cast iron water pipe of not inspecting said pipe or replacing the same until a break occurred and water had escaped and saturated the surrounding ground to the extent that it was detectable from the surface.

(c) Said shed did not have adequate watchmen or other available detection devices to detect leakage from said eight-inch cast iron water pipe and/or adequate watchmen or other available device at said shed to discover the entry or presence of water in said shed.]

11. It is true that the City adopted a policy of not maintaining, repairing or replacing its buried water pipe lines until some trouble was reported or some evidence of leakage developed. [*It is not true* that the City negligently and carelessly allowed said eight-inch cast iron water pipe to become ancient and in a weak, corroded and decayed condition so that said pipe could not contain

the water under the pressure placed therein by said defendant City.] The Court finds that the City was not negligent in the maintenance of said cast iron water pipe.

12. It is true that on March 12, 1956, a large quantity of water escaped from the aforesaid eight-inch cast iron lateral pipe under a pressure of approximately 65 pounds per square inch, which water flooded the floor of the shed at Berth 59 and damaged the coffee which, for the purposes of these Findings, is assumed was owned by plaintiff. [*It is not true* that a large quantity of water escaped from said pipe prior to March 12, 1956.] It is untrue that said damage, if any was caused by the negligence of the City.

13. The City was not negligent in maintaining, operating or installing the pipe which burst on March 12, 1956, or in failing to keep an adequate or any watch at said shed or in failing to discover the leakage with reasonable speed, or in any other respect. [*It is not true* that the City was negligent in maintaining high water pressure in said pipe without ascertaining whether said pipe was of sufficient strength at said time to withstand said pressure. *It is not true* that the City was negligent in permitting said pipe to remain in use when it was of such an age as, under existing conditions, rendered it unsafe for the purpose intended.]

14. That on the 25th day of April, 1956, plaintiff Grace & Co. (Pacific Coast) duly and regularly filed its verified claim covering the above-mentioned damages with Walter C. Peters, the City Clerk of the City of Los Angeles. That said verified claim specified the name and address of claimant, the date and place of the action of which complaint is made, and the extent of the damage received.

That the said claim has been rejected by defendant City. That nothing has been paid on account of the said claim or any part thereof.

15. It is true that the matters alleged in the Second Amended Complaint are within the jurisdiction of this Court but all allegations contained therein are untrue except as herein expressly found to be true.

16. It is true that said eight-inch cast iron water pipe was installed by the Harbor Department of the City in 1914 as a part of a water fire line system which at all times mentioned in the Second Amended Complaint was under the control of and operated by the Harbor Department of the City solely for the purpose of providing water for fire fighting and fire prevention.

[*It is not true* that said water pipe line system now is and at all times mentioned herein was owned and operated by defendant City in its proprietary capacity for supplying water to various consumers, for which purpose said defendant City maintained water meters and charged consumers at established rates for the use of said water.]

17. The City adopted a policy of not maintaining, repairing or replacing its buried water pipe lines until some trouble was reported or some evidence of leakage developed. [*It is not true* that said policy was adopted with disregard for the safety of goods and merchandise in said shed. *It is not true* that defendant City as the owner and operator of said eight-inch cast iron water pipe as aforesaid owed a duty to plaintiff to maintain said water pipe in a reasonably safe and sound condition so as to prevent loss or damage to plaintiff's goods stored in said shed as aforesaid by the escape of water from the said pipe.]

18. [*It is not true* that the defendant City negligently and carelessly omitted and failed to maintain said eight-

inch cast iron water pipe in a safe and sound condition or at all. *It is not true* that the City negligently and carelessly allowed said pipe to become ancient and in a weak, corroded and decayed condition so that said pipe could not contain water under the pressure placed therein by said defendant City.]

19. It is untrue that the damage, if any, to the coffee assumed to be owned by plaintiff was caused by the negligence of the City in any respect whatever.

20. It is true that the City is a local agency under the definition and within the meaning of §§53050 and 53051 of the Government Code of California; and that the shed at Berth 59, Pier 1, Los Angeles Harbor, in that portion of Los Angeles County known as San Pedro, is and on March 12, 1956, was owned by the City, and that said eight-inch cast iron water pipes installed beneath the streets outside of said shed and owned and operated by the Harbor Department of the City is public property under the definition of and within the meaning of §§53050 and 53051 of the Government Code of California.<sup>1</sup>

21. It is untrue that on or about March 12, 1956, or at any time prior thereto, the City or its Harbor Department planned, constructed, installed or maintained its said pipe line in a manner or according to a design in-

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<sup>1</sup>Finding No. 20 also contains the following statement:

"The remaining allegations of paragraph II of the Third Cause of Action are untrue."

There are, however, no "remaining allegations". The finding differs from the allegations of said paragraph in only one respect—the Complaint refers to pipe installed "beneath said shed", whereas the finding refers to pipes installed "beneath the streets outside of said shed". Certainly the Court did not intend to find that the service laterals running from the street and extending under the shed were not "public property". Accordingly, plaintiff submits that the finding should be read as including the pipe beneath the said shed.

herently, or otherwise, dangerous or defective for the intended use or the use made of said property. It is true that said cast iron pipe was installed about 1914 by the Harbor Department of the City and was buried approximately 9 to 10 feet underground and under a concrete floor or loading dock or platform and covered with a compacted dirt fill, and that the City followed a policy of not inspecting such buried pipe or replacing the same until some trouble was reported or some evidence of leakage developed.

[*It is not true* that said public property was in a dangerous and defective condition for many years prior to March 12, 1956, in that:

(a) The floor of the said shed was constructed by laying a wire mesh over the top of said compacted dirt fill and pouring concrete of a depth of approximately six inches on top of said wire mesh without the use of reinforcing steel. Said floor was dependent for support on the said dirt fill and could not withstand the weight of the cargo intended to be placed thereon and which was regularly and usually placed thereon.

(b) Said shed did not have adequate watchmen or other available detection devices to detect leakage from said eight-inch cast iron water pipe and/or adequate watchmen or other available devices at said shed to discover the entry or presence of water in said shed.

(c) Said eight-inch cast iron water pipe was ancient and in a weak, corroded and decayed condition so that said pipe could not contain water and rendered it unsafe for the purpose intended.

(d) Said eight-inch cast iron water pipe was of such an age and under existing soil conditions said pipe could not reasonably have been expected to contain water under pressure therein.

(e) Or in any other respect.

*It is not true* that by reason of any of these premises plaintiff's goods situated in said shed were subjected to great and unreasonable risk of loss or damage from the condition of said public property.]

22. [*It is not true* that the City knew and had notice of the condition of said public property referred to in paragraph 21 hereof. It is not true that the City in the exercise of reasonable care in the ordinary course of the business and governmental activities it conducted should have known or had notice of the condition of said public property referred to in paragraph 21 hereof.]

23. [*It is not true* that the City had knowledge or notice or should have had knowledge and notice of the following matters and conditions:

(a) That underground cast iron pipe, such as the said eight-inch cast iron water pipe installed, owned and maintained by defendant City beneath said shed as alleged is subject to deterioration and failure from graphitic corrosion and that when such pipe is exposed to soils near the sea the rate of deterioration and failure from graphitic corrosion is greatly increased.

(b) That the danger of failure of underground cast iron pipe from graphitic corrosion in the Harbor District in that portion of Los Angeles County known as San Pedro is particularly great.

(c) That the said eight-inch cast iron water pipe installed, owned and maintained by defendant City beneath said shed as alleged was of such an age, as under existing conditions, to render it unsafe and make it unreasonable to expect said pipe to contain water under pressure therein.

(d) That by failing and omitting to install and make use of available detection devices to discover leakage from said eight-inch cast iron water pipe and by not inspecting said pipe or replacing the same until a failure occurred and was detected from the surface, that the goods and merchandise in said shed would be subject to great risk of loss or damage by the flooding of said shed with water.

(e) That when said eight-inch cast iron water pipe failed and was unable to contain water under the pressure therein that the fill supporting the floor of said shed would be saturated with water and would subside and that the goods and merchandise in said shed would be subject to great risk of loss or damage by the collapse of said floor and/or the flooding of said shed with water.]

24. [*It is not true* that the City for a reasonable time after it knew and had notice of the condition of said public property had ample opportunity to take action necessary to protect the public, including the plaintiff herein, against said condition. *It is not true* that the City negligently and carelessly failed and omitted to correct the condition of said public property or to protect the public, including plaintiff, against the said condition.]

25. It is true that on March 12, 1956, water escaped from said pipe, all as more particularly set forth in paragraph 12 hereof. [*It is not true* that in failing and omitting to remedy said condition or to take action to protect the public, including the plaintiff, against said condition, the City negligently and carelessly caused said coffee to be damaged by reason of the escape of water from said pipe by reason of the condition of said public property.]

26. It is true that at all times mentioned in the Second Amended Complaint the Board of Harbor Commissioners of the City of Los Angeles was the duly constituted authority having jurisdiction, superintendence and control, under the provisions of the Charter of said City, of the Harbor Department, a branch of the government of said City, and the shed and pipe lines in and about Berth 59 at Los Angeles Harbor.

27. It is true that the City had no opportunity for a reasonable time or any time after acquiring notice or knowledge or receiving notice to remedy any condition existing in said water pipe or to take any action reasonably necessary to protect plaintiff against said condition after acquiring notice thereof.

28. \* \* \*

### **Specification of Errors.**

#### **(a) Assignments of Error Relating to the Duty of the City.**

1. The Court erred in finding untrue [Finding No. 3, R. 100, 101] the following portions of Paragraph III of the Second Amended Complaint [R. 58]:

“That defendant City at all times . . . exclusively maintained a certain steel and concrete shed at Berth 59, Pier 1, Los Angeles Harbor in that portion of Los Angeles County known as San Pedro (hereinafter referred to as the said shed). Defendant City, together with defendant Outer Harbor at all times mentioned herein operated the said shed, for hire, for the receipt of merchandise in transit from various portions of the United States and of the world to various other portions of the United States and the world. Said shed now is and at all times mentioned

herein was used to store goods brought to Los Angeles by ship while awaiting delivery of the same to the owners thereof.”

Finding No. 3 is to the effect that the City owned and operated Berth 59; that it was used for the receipt and shipment of goods to and from Los Angeles Harbor, and that the “remaining” allegations of paragraph III of the Second Amended Complaint are untrue. The language quoted above is this remainder. The important allegations thus found to be untrue are that the City exclusively maintained the shed; and that it was operated by the City for hire, in the way described. The finding thus made, that the City did not exclusively maintain the shed is contrary to the uncontradicted testimony of the witness Berry [R. 296], which was never in any way disputed. The finding that the City did not offer the shed for hire, for the storage of goods in transit to and from places all over the world, is contrary to the provisions of the City’s Tariff, governing the use of the premises, copy of which was filed as Exhibit B. There was no evidence to the contrary.

2. The Court erred in finding untrue [Finding No. 7, R. 101, 102] the following allegations of Paragraph VII of the Complaint [R. 60, 61]. This finding, again, is a finding that the “remaining” allegations of Paragraph VII are untrue. The allegations are:

“Plaintiff Grace & Co. (Pacific Coast) was at all times hereinafter mentioned the owner of approximately, 1960 bags of coffee, the product of various South and Central American Countries, which said coffee was at all times hereinafter alleged resting in said shed having been a short time prior thereto discharged by various vessels and was then and there

awaiting delivery to plaintiff. Said bags of coffee were placed in said shed at the joint and in common invitation of defendant Outer Harbor and defendant City and for the benefit of both said defendants, pecuniarily and otherwise.”

The crucial finding here is the denial that the coffee was placed in the warehouse at the invitation of the defendant for its pecuniary benefit. Said finding is contrary to the uncontradicted testimony of the witness Berry that plaintiff’s merchandise was in the subject premises, having been discharged from the ship and awaiting pickup, [R. 296], and to the evidence of the City’s Tariff [Ex. B] that the dock is offered for hire for this use.

3. The Court erred in finding untrue [Finding No. 5, R. 101] the following allegations of Paragraph V of the Second Amended Complaint [R. 60], by finding the “remaining” allegations of Paragraph V untrue. These allegations read as follows:

“As an integral part of said shed and the marine terminal facility operated therein as aforesaid, defendant City at all times herein mentioned *exclusively* owned, operated and maintained an eight-inch cast iron water pipe installed beneath said shed.” (Emphasis added.)

The Court found affirmatively in Finding No. 5 that the City maintained this pipe *in the public street*. This is contrary to the express testimony that the pipe commenced in the public street and went underneath the building, and to the testimony which, without dispute, was that the break itself was beneath the loading platform of the building [R. 148]. Likewise, this finding

denies that the City *exclusively* maintained this pipe, and uncontradicted testimony was to the effect that it did [Berry, R. 296].

4. The Court erred in finding untrue [Finding No. 16, R. 104] the allegations contained in Paragraph III of the Second Cause of Action of the Second Amended Complaint [R. 65], which reads as follows:

“That said eight-inch cast iron water pipe was installed about the year 1914 by defendant City as a part of a water pipeline system which now is and at all times herein mentioned was owned and operated by defendant City in its *proprietary capacity*. . . .”  
(Emphasis added.)

We believe that the testimony shows beyond any question that this water pipe was operated either as part of the City’s water system, or as part of its warehouse facility. There is no question under the law but that either is a proprietary, not a governmental activity.

We contend that these errors are critical. A failure to recognize a relationship which gives rise to a duty of care must lead to error in the determination of negligence. The importance of these errors is made highly explicit by the specifications in the succeeding assignments of error.

**(b) Assignments of Error Relating to the Standard of Care Itself.**

5. The Court erred in finding untrue [Finding No. 8, R. 102] the following allegations of Paragraph VIII of the First Cause of Action of the Second Amended Complaint [R. 61]:

“Defendant City in its capacity as (a) owner of said shed and said eight-inch cast iron water pipe,  
(b) landlord in possession of said shed and said

eight-inch cast iron water pipe and (c) as a marine terminal operator jointly and in common with defendant Outer Harbor, owed a duty to plaintiff to provide a safe shed for the interim storage of plaintiff's goods and to maintain said shed and said eight-inch cast iron water pipe in a safe and sound condition so as to prevent plaintiff's goods in said shed from becoming lost or damaged by the entry of water into said shed."

6. The Court erred in concluding, in its Opinion, [R. 83-94] that the standard of care applicable is the custom of other municipalities.

7. The Court erred in concluding, in its Opinion, [R. 83-94] that there was no duty to inspect, repair, or replace pipes beneath defendant's warehouse, and that a policy of non-maintenance was not negligence.

8. The Court erred in finding that the City was not negligent in its maintenance of the eight-inch cast iron water pipe installed beneath the transit shed at Berth 59 and the loading platform attached thereto. (A finding of no negligence is made in each of the following numbered findings: 10, 11, 12, 13, 17, 18, 19, 21, 24, 25 and 27 [R. 102-107]. In addition, Findings No. 22, 23 and 27 are predicated wholly upon the assumption that the City was not negligent in any respect.) This determination of no negligence is clearly erroneous for several reasons:

(a) The finding of no negligence follows inevitably from the finding that there was no duty, which is clearly erroneous;

(b) This is a case in which, since defendant was a warehouseman, defendant carries the burden of proving that the damage occurred without its neg-

ligence. No evidence was offered meeting this burden.

(c) This is a case in which the Doctrine of *res ipsa loquitur* applies to place the burden on the defendant of going forward with evidence accounting for the break in a way that is indicative that there was no negligence on its part. No evidence to this effect was offered.

(d) This finding is clearly contradicted by the finding and the evidence that the policy of the City was not to repair, replace or maintain its pipe until water appeared on the surface of the ground.

(e) The Trial Court's determination that the City was not negligent is tied firmly to its erroneous finding that the operation and maintenance of the eight-inch water line involves a governmental rather than a proprietary operation by the City. The statutory standard of care applicable to a local agency such as a city, acting in its governmental capacity, is not as demanding as that imposed upon a local agency when engaging in a proprietary activity.

(f) Even if it be assumed, *arguendo*, that the governmental standard of care was the applicable standard, the Court should have found that the City acted negligently in discharging its statutory obligations. More specifically, the Court erred in finding that the eight-inch water line system was not in a "defective and dangerous condition" [Finding No. 21; R. 105]; that the City did not know or have notice of the condition of said water line system [Findings No. 22 and 23]; and that the City had no opportunity for a reasonable time after acquiring notice or knowledge of the condition of said pipe to take any action reasonably necessary to protect

plaintiff's property [Findings No. 24, R. 105 and Finding No. 27, R. 106, 107]. Those findings, as well as the general findings of no negligence enumerated above, are clearly erroneous. It is clear from the evidence that the City had actual or constructive notice of the defective and dangerous condition existing in said water line system (*it had leaked for months*), and that for a reasonable time after acquiring such notice failed to remedy the condition or to take any action reasonably necessary to protect the public against the condition.

(c) Assignment of Error Relating to the  
Admission of Evidence.

9. The Court erred in admitting over plaintiff's objection and in failing to strike from the record upon motion an answer given by the City to an interrogatory propounded to it by the plaintiff pursuant to Rule 33 of the Rules of Civil Procedure. The answer so put in evidence was from the document entitled "Additional Answers to Interrogatories Numbered VIII, XIII, XIV, XVI and XVII, submitted by Defendant City of Los Angeles as Required by Court Order Made February 25, 1957." [R. 37-39, 163-164.] Said answer stated that on further investigation and study of Harbor Department records the City found itself to have been in error with respect to the answer made to interrogatory No. XIV(b) previously put in evidence by plaintiff concerning two prior leakages due to corrosion in Harbor Department pipes in the area of Berths 59 and 60. [R. 156-157.] That evidence and plaintiff's objections thereto are as follows:

"Mr. Yoakum: Just, a minute, your Honor please, Counsel has not completed the answers to the interrogatories. As I said to your Honor, that answer was explained in the additional answers.

The Court: He wanted to read something in the interrogatory and you objected. You wanted this all read at one time. This is the only interrogatory he has presented. If you wanted to present another interrogatory at the proper time, you may do so. I don't know what it is.

Mr. Yoakum: We think, your Honor, when a witness makes an answer and then corrects it, certainly if he says one thing in a deposition, counsel can't just drop him there when he has corrected it some pages later.

The Court: Where are the other interrogatories?

Mr. Yoakum: That was filed July 15, 1957, additional answers to interrogatories.

The Court: Additional answers to interrogatories.

Mr. Yoakum: Yes. There is an answer with this same affiant. I submit in fairness, so that it will be in its proper context, it should be read.

The Court: What interrogatory do you want read?

Mr. Yoakum: What is on page 2 and goes over to page 3. It is headed, "Answer to First Requirement."

The Court: Don't you think this interrogatory and answer should be read?

Mr. Verleger: I think the original document is an answer and as such is admissible. I think the subsequent one is self-serving and for that reason—

The Court: Well, you go ahead and read it, anyway. Let's get it into the record.

Mr. Verleger: Can you give me the page again?

Mr. Yoakum: Start at the top of page 2.

The Court: That was filed July 15th.

Mr. Verleger: That's right, and the others, as I recall, were filed in January.

Mr. Yoakum: February 15th.

The Court: Start at the top of the page.

Mr. Verleger: 'First: Respecting plaintiff's Interrogatory Number 8, the defendant THE CITY OF LOS ANGELES is required to give the dates of any reports made where evidence of a leakage occurred as to piping in the transit shed referred to in the defendant's answer to plaintiff's said Interrogatory No. 8, and to give the name of the person to whom said report was made.'

The answer:

'The dates of any reports made where evidence of a leakage in the transit shed referred to in defendant's Answer to Plaintiff's Interrogatory No. VIII, and the name of the person to whom said report was made, are as follows: No leakage due to corrosion or otherwise was ever reported prior to the escape of said water from said pipe, in said pipe or in other piping inside the transit shed referred to at Berth 59. The date and the names of the persons making and receiving the report on the leakage which occurred March 12, 1956, are given in the Answer to Interrogatory No. VI.

'Upon further investigation and study of Harbor Department records, affiant finds himself to have been in error with respect to incidents of prior leakage given in his Answer to Interrogatory No. XIV (b) heretofore made as follows: "On February 15, 1954, a section of five-inch cast iron bell and spigot water pipe was replaced, due to corrosion, at Berth 60. On October 11, 1955, a section of eight-inch

cast iron bell and spigot water pipe was repaired, due to corrosion, at Berth 59.”

‘Affiant now corrects said answer quoted above to read as follows: On February 15, 1954, a section of five-inch cast iron bell and spigot water pipe inside the transit shed at Berth 60, which shed is separated by a concrete fire wall and driveway from the transit shed at Berth 59, was repaired due to a straight sheer from an unknown cause. This break was not due to corrosion. The transit shed at Berth 60 was empty at the time and no cargo damage occurred. No record of a report of leakage has been found in Harbor Department files. The broken pipe was repaired with a split sleeve at a time when a bulkhead within the said transit shed was undergoing repair. On October 11, 1955, at 4:15 p.m., Harbor Department plumber Dale Pence was notified by telephone by Margaret Reynolds, secretary in the Operating Division, of a water leak at Berth 59 in the street outside the transit shed opposite Door 25. On October 13, 1955, the leak, due to a broken leaded joint, was repaired. This leak was not caused by corrosion. No water damage occurred in the transit shed at Berth 59 at said time.’ Your Honor, in view of my prior objection, I would move to strike that on the ground it is self-serving. The Court: Denied.” [R. 161-165.]

### Summary of Argument.

We have not been able to escape the feeling that we owe the Court an apology for the time we will have to spend in proving the obvious. Each of the propositions urged herein, we believe, is a familiar one. Yet each has been the subject of extended argument in the briefs previously filed with the Trial Court, and many of them

have been resolved against us. We have to assume, therefore, that they must be argued fully here. To the extent, nevertheless, that we extend ourselves on points which the Court well knows, we can only again express our regret.

The basic points in our argument are the following:

*First:* The City's function is that of a marine terminal operator, essentially a warehouseman. As such, it offered the premises in question to the general public for a price. As such, if its liability is the same as that of a private individual, it was under an obligation to maintain its premises in a safe condition for the protection of the goods stored. Findings to the contrary are clearly erroneous.

*Second:* The City, in carrying on this terminal business, was acting in a proprietary capacity. Therefore, it was subject to the same liability as a private individual. Again, the finding that a governmental activity was involved is clearly erroneous.

*Third:* The City did not keep its premises in repair. On the contrary, it was the City's policy to do nothing about either inspecting or replacing superannuated pipe until water appeared on the surface. This policy was adopted and maintained despite the fact that the pipe in question was unprotected cast iron pipe in highly corrosive soil, where the anticipated life of the pipe was only on the order of 15 to 20 years, and the pipe had been in for something like 40 years. This was so, even though there was, apparently, a considerable leakage through the pipe which was undiscovered by the City, which could have been discovered at any time by reading the meters.

On these facts, which will be detailed below, liability would arise, (a) because there is a total failure of per-

formance of the duty of the warehouseman; and (b) because the Doctrine of *res ipsa loquitur* applies where a pipe fails; and (c) because there was no evidence rebutting the inference which arises under *res ipsa*.

We think, in reviewing this portion of the case, that a fact which will startle the Court is the extent and the intimacy of the City's knowledge of the hazards involved, and the indifference of the Harbor Department to those hazards.

This pipe failed because of what is called graphitic corrosion. That means simply that the pipe rusted out.

Cast iron pipe, in non-corrosive soil, has a durability which is legendary. In corrosive soil, however, the record of such pipe is not good, but lamentably bad. As one of the City's experts reported some twenty years ago, in such soils it has about the worst record of any material generally used. Today, cast iron pipe is recognized as an unsuitable material for use in such soil.

Long prior to the failure, the City had taken soil samples in the vicinity of this warehouse. Years before this failure they had prepared maps which showed this soil to be highly corrosive. There was substantial agreement between the City's expert and plaintiff's expert that failures of cast iron pipe are to be considered as probable in such soil after twenty to twenty-five years. This pipe had been in for forty years.

This was not merely a theory. There had been a number of previous failures of pipe of like age in this general area. And the evidence went beyond this. The City's records *showed an unaccounted for flow of water through this particular pipe on the order of 130 cubic feet a day for months prior to this failure*. The testimony of the City's witnesses was that such a flow indicated that something serious was the matter.

The only explanation and the only justification for total inactivity was testimony that it is generally not customary in the utility industry to remove cast iron pipe from corrosive soil, until failures become so frequent that it is cheaper to replace the pipe than it is to patch it. The explanation for this practice given by one witness was simply that it is *cheaper to pay claims than it is to go in and replace pipe*. The only other explanation offered by anyone else was that it is expensive to replace entire pipe systems.

This is the only justification offered by the defense. It would seem apparent that where there is a duty of care, the mere fact that it is inexpensive to do nothing is no defense. It may well be cheaper to replace one's tires on one's car, only after they blow out. We hardly think any court would consider this to justify a deliberate decision to ignore the effect of wear and tear on one's tires.

Nevertheless, since this is the only excuse offered, we believe it will be necessary to point to the authorities which establish that a custom which is founded solely on considerations of economy, rather than care of the goods bailed, is not an excuse for non-performance of the warehouseman's duty, and to point out that a deliberate decision on the part of a warehouseman not to maintain his premises is really, in effect, an assumption of liability.

*Fourth:* We will contend that even if the City's activities be treated as governmental, the requisites of liability exist.

*Fifth:* We will contend that the Court erred in admitting the City's answers to plaintiff's interrogatories as evidence for the City.

## ARGUMENT.

### I.

Defendant Was Under a Duty to Maintain Its Premises in a Safe Condition. The Court Erred in Finding to the Contrary. (Specifications of Error Nos. 1-8.)

#### (a) Preliminary.

Before we talk about what the City did in this case, we think we should clear the underbrush about their obligation to do something. We think the major question in this case is—What is the City's obligation? To decide that question, one needs to ask—What was the City's relation to the cargo?

The pleadings and Findings as to the relation were as follows:

Paragraph III of the Second Amended Complaint alleged the following [R. 58]: (The italicized portions seem to have been found to be untrue, as per the finding next quoted.):

“That defendant City at all times mentioned herein owned *and exclusively maintained* a certain steel and concrete shed at Berth 59, Pier 1, Los Angeles Harbor in that portion of Los Angeles County known as San Pedro (hereinafter referred to as the said shed). *Defendant City, together with defendant Outer Harbor at all times mentioned herein operated the said shed, for hire, for the receipt of merchandise in transit from various portions of the United States and of the world to various other portions of the United States and the world. Said shed now is and at all times mentioned herein was used to store goods brought to Los Angeles by ship while awaiting delivery of the same to the owners thereof.*” (Emphasis added.)

The Findings respecting Paragraph III of the Second Amended Complaint were as follows: [R. 100-101]:

“At all times mentioned in the Second Amended Complaint the City owned and operated by and through its Harbor Department a steel and concrete shed at Berth 59, Pier 1, Los Angeles Harbor, in that portion of Los Angeles County known as San Pedro; said shed was used for the receipt and shipment of goods to and from Los Angeles Harbor.

“The remaining allegations of paragraph III of the Second Amended Complaint are untrue insofar as they refer to the City.”

The net of this is that while it was found that the City owned and operated Berth 59, it was found not to be true that the shed was operated by the City for hire, and not to be true that it was used for the storage of goods awaiting delivery.

Paragraph VII of the Second Amended Complaint alleged as follows (referring to plaintiff's coffee) [R. 60-61]:

“Plaintiff Grace & Co. (Pacific Coast) was at all times hereinafter mentioned the owner of approximately 1,960 bags of coffee, the product of various South and Central American Countries, which said coffee was at all times hereinafter alleged resting in said shed having been a short time prior thereto discharged by various vessels and was then and there awaiting delivery to plaintiff. Said bags of coffee were placed in said shed at the joint and in common invitation of defendant Outer Harbor and defendant City and for the benefit of both said defendants, pecuniarily and otherwise.”

This was found to be untrue in its entirety (except as to the allegations re title, which were passed over).

Paragraph VIII of the Second Amended Complaint reads as follows: [R. 61]:

“Defendant City in its capacity as (a) owner of said shed and said eight-inch cast iron water pipe, (b) landlord in possession of said shed and said eight-inch cast iron water pipe and (c) as a marine terminal operator jointly and in common with defendant Outer Harbor, owed a duty to plaintiff to provide a safe shed for the interim storage of plaintiff’s goods and to maintain said shed and said eight-inch cast iron water pipe in a safe and sound condition so as to prevent plaintiff’s goods in said shed from becoming lost or damaged by the entry of water into said shed.”

This was found to be untrue [Finding No. 8, R. 102] as follows:

“The allegations of Paragraph VIII insofar as they refer to the City are untrue except that it is true that the City owned a cast iron pipe as more specifically found in paragraph 5 hereof.”

In sum then, the Findings recognize that the City owned and operated Berth 59. They find that the City was *not* a marine terminal operator, and was *not* under any obligation to provide a safe place for the storage of plaintiff’s merchandise. Of course, if there was no duty, the subsequent findings of no negligence follow. If there was a duty, the error in failing to recognize it would make errors very likely, if not inevitable, in determining negligence.

At this point, we need, therefore, to refer to the evidence as to the use of these premises, to see what the City was and what it did.

(b) Use of These Premises.

It is allged and found that the City operated these premises. What were they operated for?

The Tariff of the City of Los Angeles, for the use of these premises, was in evidence. [Ex. B, R. 423.] It refers to port terminal facilities as "wharf premises" [Ex. B, Item 100]. The City makes a charge which it calls "wharfage" for "the service or use of a municipal wharf and wharf premises" for the deposit in a wharf, or the handling on a wharf, of inbound or outbound merchandise. [Ex. B, Items 400, 405, 410, 415.] Wharfage is collected from the vessel responsible for the presence of the merchandise. [Ex. B, Items 425, 430, *et seq.*] In addition to wharfage, if the merchandise stays for a longer period than five days on coastwise, or ten days on foreign, further charges known as "storage" and "demurrage" are assessed. [Ex. B, Items 500-525.] This is charged against the merchandise itself, and the owner must pay these charges to obtain possession of his goods. [Ex. B, Items 500-515.]

The actual assembly and distribution of merchandise is carried on by individuals known as "Berth Assignees". [Ex. B, Item 605.] The Berth Assignee does not have exclusive possession. On the contrary, the City retains the right to put other assignees in portions of the premises. [Ex. B, Item 605; and R. 296, 297], and the City does all maintenance. [R. 19, 20.] Berth 59 was used in just this way. [R. 296, 297.]

The bags of coffee involved in this lawsuit had been discharged from the ship and were awaiting delivery. [R. 297.]

To sum up, then, the City provides maintenance and retains control of a building which, for a price, it uses for the storage and handling of cargo. This is, of course, an ordinary warehousing function. The findings to the contrary are erroneous.

(c) The Legal Obligation of a Warehouseman to  
Maintain His Premises.

What then, is the maintenance obligation of a person offering his premises for hire to the public for storage of their merchandise?

This question has been explicitly answered time and again. We quote the opinion of the leading case of *Buffalo Grain Co. v. Sowerby*, in the Court of Appeals of New York, 195 N. Y. 355, 88 N. E. 569 (1909) wherein the Court made the following observation:

“The association, therefore, as a warehouseman, must be deemed to have held out to the public this elevator as a proper and fit building in which to store grain. Buildings of this character are liable to deteriorate. They may be weakened by storms and winds, and, when constructed upon piles over waters or low lands, the piles may decay and the foundation become weak, endangering the structure. *A warehouseman, therefore, in the exercise of reasonable care, owes a duty to his patrons of making reasonable inspection from time to time to see that the building remains safe and in a proper condition.*” (Emphasis added.)  
88 N. E. 570.

The *Buffalo Grain Co.* case was followed in *Stein Hall & Co. v. Sealand Dock & Terminal Corp.*, 149 N. Y. Supp. 2d 537 (1956) against a corporation which was performing precisely the function of the defendant. The case involved 4,000 plus bags of flour placed by the

carrier on a dock in New York. The dock collapsed due to decay. The Court said concerning liability:

“It is conceded that the Dock Co. operated, maintained and controlled the Huron Street pier. Therefore, the duty was imposed upon it to *keep and maintain said structure in a good and safe condition*.

“I find from all of the adduced testimony that the Dock Co. failed in this duty and that the sole proximate cause of the collapse of the pier was occasioned by such failure.

“There is ample basis in the testimony and in the photographs submitted in evidence to justify the opinion offered by the plaintiff’s experts to the effect that the pier collapsed solely because of the rotted, defective and badly deteriorated condition of its supporting structure and sub-structure. This opinion was not overcome by the testimony offered by the defendants’ experts. The evidence offered by the defendants concerning the periodic inspections and repairs to the pier was neither impressive nor persuasive and finds no substantiation in the photographs in evidence.” (Emphasis added.) 149 N. Y. Supp. at 542.

It is worth noting that in that case, the defendant at least made a showing that there had been inspections of the dock. In the present case, as will be seen, the showing was that the City’s custom was *not* to make inspections. Our case is an *a fortiori* one for liability.

In *Schell v. Miller North Broad Storage Co.*, 45 Atl. 2d 53 (1946), the Supreme Court of Pennsylvania reached the same conclusion, where damage was

caused by the deterioration of fire doors. In the words of the Court:

“Installing the fire doors according to a statute or an ordinance was not the full measure of appellee’s duty. It was *obliged to maintain them in such condition that they would perform the function for which they were installed. DeGrazia v. Piccardo*, 15 Pa. Super. 107. Appellee could not assume, contrary to all human experience, that the fire doors would continue to operate simply because there were no obvious defects and because they had been in use for many years. It was required to maintain doors, and the doors were effective only if kept in a fit condition; it was obliged to keep them in repair; and for the purpose of making repairs it was required to make such inspections as were reasonably necessary to discover such defects as might exist.” (Emphasis added.) 45 Atl. 2d at 56.

The same principles have been followed in the Federal Courts and in California.

In *General Motors Corp. v. The Olancho*, 115 F. Supp. 107 (S. D. N. Y. 1953) affirmed *per curiam*, 220 F. 2d 278 (C. A. 2d, 1955), the Court had before it the related question of what constitutes due diligence to make a vessel seaworthy. The particular case involved damage due to failure by reason of corrosion of a part of the vessel’s framing, just as the present case involves damage by reason of corrosion of a pipe. The framing in question was normally under a ceiling of wood over the turn of the bilge. Warnings had been circulated that such plating was subject to corrosion (just as in the present case there was ample warning that piping in the soil types existing at Signal Street was subject to corrosion). It was held that

the failure to inspect for and discover this corroded area constituted negligence.

*California & Hawaiian Sugar R. Corp. v. Harris County, etc. Dist.*, 27 F. 2d 392 (D. C. Tex. 1928) is most similar to the present case. That case involved the storage of sugar at a wharf. The sugar became wet because a water pipe broke beneath the wharf. The Court held that the Doctrine of *res ipsa loquitur* applied, and held the dockman liable.

These cases rest on the simple principle that it is the obligation of the warehouseman to exercise reasonable care to protect the merchandise of which he has custody. That duty is spelled out in the California statutes and cases, and in the decisions of this Court:

*Lawrence Warehouse Co. v. Defense Supplies Corp.*, 164 F. 2d 773 (C. C. A. 9th 1947);

*Chatterton v. Boone*, 81 C. A. 2d 943, 185 P. 2d 610 (1947). (Duty of a warehouseman to protect watersoaked property against deterioration);

*Scott's V. F. Exch. v. Growers Refrig. Co.*, 81 C. A. 2d 437; 184 P. 2d 183 (1947). (Warehouseman storing fruit must maintain storage rooms at suitable temperatures);

*Crescent Bed Co. v. Jonas*, 206 Cal. 94, 273 Pac. 28 (1928). (Bailee storing bed springs must protect against water so as to avoid rust).

We believe, under these authorities, that the City was under an obligation to provide a suitable warehouse, since it offered its services to the public as a warehouseman. And we submit therefore, that the finding that there was no duty was wrong.

There remains for consideration on the subject of duty, one major question. The Trial Court found that the City's

activity was governmental, not proprietary. The cases above concern private individuals. A different standard would apply if this was a governmental activity. We pass, therefore, to this question.

## II.

**The Court Erred in Finding That the City in Its Operation and Maintenance of the Eight-Inch Water Line System in the Area of Berth 59, and Under the Jurisdiction of Its Harbor Department, Was Connected With a Governmental Function, and That the City Did Not Act in a Proprietary Capacity in Such Operation and Maintenance. (Specification of Error No. 4.)**

The Second Amended Complaint was in two counts, the first stating allegations suitable to proprietary liability, and the second for governmental. The Court found [Findings No. 16 and 20, R. 104] that the City operated and maintained the eight-inch water line system in the area of Berth 59 as a governmental activity.

That finding is subject to review in its entirety, for a finding of fact will always be set aside where it was induced by an erroneous view of the law.

*General Casualty Co. v. School District No. 5*,  
233 F. 2d 526, 527-8 (C. A. 9th 1956).

It is clear that it is solely a question of law whether under a given set of facts an act of a municipality is performed as part of a governmental function or as part of a proprietary activity.

*Carr v. City & County of San Francisco*, 170 Adv.  
Cal. App. 54, 58, 338 P. 2d 509 (1959);

*Barrett v. City of San Jose*, 161 C. A. 2d 40,  
42, 325 P. 2d 1026 (1958).

Furthermore, it is settled that an appellate court is always concerned with determining whether the Trial Court arrived at and applied a proper standard of care in a particular case.

*Maragakis v. United States*, 172 F. 2d 393, (C. A. 10th, 1949);

*Clinkscales v. Carver*, 22 C. 2d 72, 76, 136 P. 2d 777 (1943).

Was there, then, a governmental act?

It is clear that the governmental powers of a city are those pertaining to the making and enforcing of police regulations, the prevention of crime, the preservation of the public health, the prevention of fires, the caring for the poor, and the education of the young.

*Chafor v. City of Long Beach*, 174 Cal. 478, 487, 163 Pac. 670 (1917).

It is only when a municipality acts in the performance of such a governmental function that the operation of all buildings and instrumentalities connected therewith involve the discharge of a governmental function.

*Chafor v. City of Long Beach*, cited *supra*;

*Sanders v. City of Long Beach*, 54 C. A. 2d 651, 129 P. 2d 511 (1942).

The function with which this action is principally concerned is that engaged in by the Harbor Department of the City of Los Angeles in operating Berth 59 (a part of the facilities of the harbor of Los Angeles at San Pedro) and the adjacent transit shed, as a marine terminal for hire, and for which the City at established rates charged for dockage, wharfage, demurrage, storage and incidentals in connection with its use. One of the instrumentalities used in that activity (owned and exclusively

maintained and kept in repair by the Harbor Department) was an eight-inch, sand-molded cast iron water main used for the fire hydrants and sprinkler system of Berth 59 and the adjacent transit shed.

The authorities are clear and uniform in holding that the above-described activity is private and proprietary, and does not in any sense involve a governmental function.

*United States v. Certain Parcels of Land*, 63 F. Supp. 175, 184-186, (S. D. Cal. 1945);

*Schwerdtfeger v. State of California*, 148 C. A. 2d 335, 306 P. 2d 960 (1957);

*Ravettino v. City of San Diego*, 70 C. A. 2d 37, 160 P. 2d 52 (1945); and

see, *Coleman v. City of Oakland*, 110 Cal. App. 715, 720, 721, 295 Pac. 59 (1930); and

cf. *People v. Superior Court*, 29 C. 2d 754, 178 P. 2d 1 (1947).

In the case first cited (63 F. Supp. 175) it was held that the dock, wharves and facilities incidental thereto located at the harbor of Los Angeles were operated by the City of Los Angeles in a proprietary capacity.

In addition, the law is equally certain that in California the operation of a municipal water system is a proprietary activity.

*South Pasadena v. Pasadena Land etc. Co.*, 152 Cal. 579, 593, 93 Pac. 490 (1908);

*Nourse v. Los Angeles*, 25 Cal. App. 384, 385, 154 Pac. 801 (1914);

*Coleman v. City of Oakland*, 110 Cal. App. 715, 720, 721 (1930);

*Sanders v. City of Long Beach*, 54 C. A. 2d 651, 660, 661, 129 P. 2d 511 (1942).

In the *Nourse* case it was expressly decided that when the City of Los Angeles acted in the performance of its assumed duty of operating a water system for the purpose of supplying water to its inhabitants, it did not act in its sovereign capacity, but in the capacity of a private corporation engaged in like business. Accordingly, the conduct of the Water Department also is to be judged not by the provisions of Section 53051 of the Government Code, but by the standard of care applicable to a private individual.

While the question has not arisen in California, it has been consistently held elsewhere that operation of a water system remains a proprietary function, where the water is used for a warehouse sprinkler system, *City of Richmond v. Virginia Bonded Warehouse Corp.*, 138 S. E. 503 (Va. 1927); or for fire mains generally, *Blake-McFall Co. v. City of Portland*, 135 Pac. 873 (Ore. 1913), *Boyle v. City of Pittsburgh*, 21 Atl. 2d 243 (Pa. 1941), *Dunston v. City of New York*, 91 App. Div. 355, 86 N. Y. Supp. 562 (1904). There are no cases to the contrary. The finding that this water was used for fire protection purposes [Finding No. 5, R. 101] does not justify the conclusion that a proprietary activity was not involved.

From the erroneous conclusion that this was a governmental activity, an error in determining the standard of care would necessarily follow. The governmental standard of care is prescribed by Section 53051 of the California Governmental Code. That section provides as follows:

“A Local agency is liable for injuries to persons and property resulting from the dangerous or defective condition of public property if the legislative

body, board, or person authorized to remedy the condition:

(a) Had knowledge or notice of the defective or dangerous condition.

(b) For a reasonable time after acquiring knowledge or receiving notice, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition.”

We have hitherto described the proprietary standard—the liability of a warehouseman. A comparison of the two standards of care readily reveals at least three important differences. To establish tort liability in respect of a local agency’s governmental activities, there must be proof: (1) that public property was in a “dangerous or defective condition”; (2) that the local agency had “knowledge or notice” of such condition; and (3) that such knowledge or notice existed in the *particular department* of the local agency which was “authorized to remedy the condition”. This is quite different from the duty of a warehouseman to maintain his premises in safe condition.

The finding that this activity was governmental therefore makes intelligible the finding that there was no obligation to provide a safe place for the goods. But, since neither the operation of a dock nor a water system is governmental activity, the finding is as demonstrably in error as anything in the record.

Since this error may well explain the more basic error, that *no duty* existed to maintain a safe dock, it is but the more serious.

The prejudicial and reversible nature of an error in testing conduct by the inapplicable standard of care, was recognized by the Court in

*Maragakis v. United States*, 172 F. 2d 393 (C. A. 10th, 1949).

In that case, the Court reversed trial court judgments in an auto accident case, and the trial court was directed to assess damages and enter judgment accordingly. The Court said, at page 395:

“The trial court, of course, has the right and duty to judge and appraise human conduct and behavior as applied to factual circumstances, and we are not warranted in overturning its appraisal of the facts when judged by the applicable standard of care, unless we are convinced that its judgment is clearly erroneous. We think, however, in this case that the trial court misconceived the standard of care by which the negligence of the Government driver is to be judged, and in so doing failed to correctly appraise the facts in the light of the legal duty.”

To sum up again, the City's duty was to keep its premises in repair; the peculiar limitations applicable to governmental liability do not apply.

### III.

**Defendant Did Not Keep Its Premises in Repair. The Court Erred in Failing to Find That This Constituted Negligence; and in Finding to the Contrary. (Specification of Error No. 8.)**

#### (a) Preliminary.

The defendant's position, we believe, is that of an ordinary warehouseman, who holds out a safe place to receive merchandise. We then come to the next question: What did the defendant do to provide the type of place he held out to the public?

Here is the testimony.

#### (b) The Physical Layout.

Berth 59 is a part of the facilities of the Harbor of Los Angeles at San Pedro. The pier on which Berth 59

is located has two buildings. The building nearest the pier end is 1,800 feet long, which is divided by fire-proof bulkheads into three rooms called transit sheds, each shed being 600 feet in length [R. 422]. The transit shed at Berth 59 is the center part of the building. Sheds for Berth Nos. 58 and 60 are at each end of the building.

The western side of the transit shed at Berth 59 faces the water, and has the usual dock facilities. The other side faces on Signal Street, which runs the length of the pier. On the Signal Street side, there is a raised loading platform which extends a few feet towards the street. The platform has a concrete floor supported by earth contained by a concrete bulkhead, and which drops approximately four feet to the street.

Underground and approximately ten feet east of the west curblin of Signal Street, there is a ten-inch water-main operated by the Water Department of the City [R. 178]. Parallel to that ten-inch main, in the street, but closer to the transit sheds, the Harbor Department of the City has an eight-inch cast iron main [R. 179]. The eight-inch main is connected in three places with the ten-inch line [R. 179].

On each of the three lines leading from the ten-inch Water Department line to the eight-inch Harbor line, there is a Hershey check valve with a meter attached for measuring the amount of water used [R. 184-186].

The eight-inch main feeds into each of the berths by way of two service laterals coming off the main [R. 183]. In the case of Berth 59, these service laterals are about a hundred feet long and they pass under the loading dock and the transit shed itself. The pipe beneath the loading platform on the land side of Berth 59 was

underground, and approximately seven to eight feet below the level of the transit shed floor [R. 150]. This pipe failed [R. 148].

**(c) The Occurrence of Damage.**

The damage to plaintiff's bags of coffee stored in the transit shed at Berth 59 occurred on or about March 12, 1956. The shed had been closed up sometime between 6:15 and 6:30 p.m. on March 11, 1956 [R. 118]. There was no guard or inspector there at night [R. 119]. Sometime during the night, the pipe burst at a point approximately beneath the door leading from the loading platform into the shed.

The escaping water was forced up through the dirt fill under the shed and loading dock floor, and apparently flowed through an opening between the loading dock floor and the transit shed foundation inside the building [R. 149]. Some of the water flowed out over the top of the loading dock into the street, and some of the water flowed down into the center of the transit shed [R. 149].

Mr. Sebastian Miretti, employed by Outer Harbor Dock and Wharf Co. as a gear foreman, arrived at Berth 59 at 5:50 a.m. on March 12, having been summoned by two customs officers who had discovered water in the area of the transit shed at Berth 59. Mr. Miretti summoned the fire department at about 6:00 a.m., and the water was shut off at about 6:45 a.m. [R. 117].

The escaping water had undermined the dirt fill, and subsequently the surface of the shed floor collapsed and dropped approximately four to six feet [R. 149]. The damage complained of resulted.

(d) Testimony re Corrosion of Cast Iron Pipe.

The experts were in agreement that the failure of the cast iron pipe in question was caused by graphitic corrosion.

They were also in agreement as to the general nature of graphitic corrosion. Graphitic corrosion is a form of electrolysis. Cast iron is composed primarily of iron and carbon. In the presence of an electrolyte such as water and any of the salts which are present in earth and water to varying degrees, a small battery is formed between each of the small particles of carbon and the adjacent iron. As the current flows the iron goes into solution in the electrolyte, leaving the carbon in its original position. The process does not change the shape or contour of the pipe, but it has the effect of weakening the pipe so that it ruptures. Rupture may take place immediately, or some time later. Once corrosion has gone through the thickness of the pipe, however, the pipe is unsafe, although it may be some time, perhaps even several years, before a serious rupture occurs, since there remains a graphite pipe.

The pipe which burst was standard cast iron bell and spigot, eight-inch water pipe with a wall 9-16" thick [R. 150]. It was made with a sand cast lining and is called sand cast pipe, or sandmolded, cast iron pipe [R. 247]. In the process of manufacturing such pipe, molten sand forms a very hard skin on the surface of the pipe. If that skin is broken while being transported or by being hit with a shovel, rolling off a truck or having a rock drop on it, the skin is broken and after installation corrosion starts at the break in the lining [R. 248, 340].

Injury to the skin of such cast iron pipe could occur at any time after its manufacture [R. 249]. This pipe was installed in 1914 [R. 146]. In 1914, it was "common" [R. 250] or as expressed by another expert it was "usual" [R. 340] for such pipe to acquire nicks and dents on the surface from ordinary handling, so that there was a high probability of corrosion starting somewhere along each length of pipe, because of the presence of such a nick or dent [R. 250]. Once corrosion starts, the rate of corrosion depends on the type of soil [R. 248]. Under ideal (non-corrosive) conditions, cast iron pipe may last as long as one hundred and fifty years. Under adverse conditions, life may be as short as five to ten years.

Very little was known about corrosivity of soil in 1914, when this pipe was installed [R. 260]. But knowledge developed rapidly thereafter. An enormous amount of literature on corrosivity was published after 1940. A substantial amount of literature was published between 1920 and 1940, and particularly by the National Bureau of Standards at Washington, D. C. Some of this work was done by the City of Los Angeles, itself [R. 285, 332, 333].

Mr. Robert R. Ashline, a corrosion engineer, employed by the Water Department of the City since 1924, had by May, 1938, published findings in the American Water Journal of the American Water Works Association concerning corrosion. His charts in that publication showed that poorly protected or unprotected cast iron pipe in corrosive soils in Los Angeles had a life expectancy of only *ten to twenty years*, and sometimes even less [R. 277]. The effect of the development of this fund of information has been to cause the discontinuance of installation

of cast iron pipe in areas (such as this one) characterized by severely corrosive conditions, unless given a protective covering (which this pipeline did not have) [R. 260, 261].

Mr. Ashline testified that since 1935 the Water Department has had a practice of determining the corrosivity of the soil along the route pipe will be laid [R. 283]. In severely corrosive soil, the Water Department generally uses cement asbestos pipe [R. 260]. If, however, pressures are high, protected cast iron pipe is used. A coal tar enamel is placed on the outside of the pipe [R. 261].

Similarly, Mr. Frank E. Alderman, another of the City's experts, testified that since 1937 it has been the better engineering practice to protect cast iron pipe installed in highly corrosive soil [R. 470].

The existence of this problem, in general terms at least, was known to the Harbor Department.

Mr. Carrol M. Wakeman testified that he was familiar with the existence of corrosion in cast iron pipe prior to March 12, 1956, and that he was aware that such corrosion was most common in soils containing chlorides commonly found near the ocean [R. 236]. There was no evidence, however, that the Harbor Department had obtained the full information that was "freely available" to it from the Water Department [R. 278].

**(e) Evidence Concerning the Corrosivity of the Soil at the Area in Question, and the Probable Life of the Pipe in Question.**

The evidence was without conflict that the soil in the vicinity of the break was highly corrosive.

Mr. James F. Brennan, a mechanical engineer and consultant on depreciation problems, employed for many years by the Pacific Gas & Electric Company in San Fran-

cisco, testified that he subjected three samples of soil taken from beneath the slab at Berth 59 to the Corfield corrosivity test and found the corrosivity index average for the three samples to be 6.5. He testified that on the Corfield scale, an index of 2 to 3 is bad soil; that 3 to 4 is very bad soil; and that an index of 6.5 is an extremely bad soil [R. 334-336].

Similarly, Mr. John F. Drake, a chemist and metallurgist, called by plaintiff, had made several hundred tests for the presence of salt and materials over a period of ten years. He examined soil removed from the defective section of pipe which had been cut out, and tested it for the presence of chlorides and sulphates. He found a considerable amount of sodium chloride (salt) [R. 205, 206].

In Mr. Drake's opinion, the quantity of chlorides present in the sample taken from the defective piece of pipe was much larger than would be found in ordinary city water [R. 213].

Mr. Drake has examined another sample of soil somewhere in the general area of Berths 58, 59 and 60 and found it also to be heavy in chloride and sulphates [R. 208].

The City was aware of the corrosivity of this soil as early as 1941. A report entitled "Progress Report of Studies of Graphitic Corrosion of Cast Iron" [Ex. No. 29], written by Mr. Robert E. Ashline and Mr. William E. Kirkendall in March 1941 for the Water Department, reported, among other things, on several corrosivity tests of soil samples taken from the soil in the Signal Street area (which is immediately adjacent to this dock). One such sample showed the soil to be a type then known to cause graphitic corrosion of unprotected cast iron pipe. The report states that graphitic corrosion "*has been par-*

*particularly troublesome in the Harbor District*” [Ex. 29 p. 81], and that “under conditions conducive to severe graphitic corrosion, *cast iron has one of the worst records for complete deterioration and failure of any of the structural materials ordinarily used in pipe line construction.*” [Ex. 29, p. 8.]

Mr. Ashline testified that the Water Department, sometime subsequent to 1935, but many years prior to 1956, became aware that the soil around Berth 59 and surrounding area was severely corrosive, because it contained a good deal of salt [R. 247, 292].

Commencing in 1935, the Department of Water & Power prepared maps indicating the relative corrosivity of the soils in Los Angeles, including the Harbor area. The map attached to one of the City’s answers to interrogatories [Ex. 28-A], shows that the soil at the pier on which Berth 59 is located was characterized as highly corrosive—having the severest rating for corrosivity shown on the chart [R. 243-246].

The first series of soil tests by the Water Department of the soil in the Signal Street area were made in 1946, and more were made in 1949 and 1952, all of course, several years before the failure [R. 288].

One of plaintiff’s experts, Mr. Brennan, testified that in his opinion, complete graphitization in certain places on the sand-molded, cast iron pipe laid in this soil could have been expected within 25 years from its installation, [R. 338-339] that is, by 1939. He testified that about two-thirds of all failures of unprotected cast iron pipe in a corrosive environment such as exists at Berth 59 would occur between the ages of 10 and 35 years, with the mean being 25 years [R. 341]. He explained that meant there was only one chance in ten that this particular

pipe would last until 1956 [R. 342, 343]. He further testified that any person interested in corrosion could have known by 1935 that corrosive failure of this pipe was "imminent" [R. 343].

Similarly, the publication of Mr. Ashline in 1938 [Ex. 29] indicated a safe life of from ten to twenty years for cast iron pipe in severely corrosive Los Angeles soil [R. 277].

**(f) Known Prior Breaks; Evidence of Prior Failures.**

Plaintiff introduced in evidence certain of the City's answers to interrogatories filed in the document entitled, "Additional Answers to Interrogatories Numbered VIII, XIII, XIV, XVI and XVII, Submitted by Defendant City of Los Angeles as Required by Court Order made February 25, 1957." These answers, commencing on line 19 of page 3 of the Answers, state that the Department of Water & Power within the area here involved, one mile inland of the pierhead lines established by the Federal Government at Los Angeles Harbor, experienced failures of cast iron pipe due to corrosion as follows:

[a] Within 1 to 5 years after installation: None.

[b] Within 6 to 10 years after installation: 9

[c] Within 11 to 20 years after installation: 29

[R. 44].

The answers to interrogatories further show that the Water Department, prior to March 12, 1956, had experienced six breaks in its ten-inch line close by Signal Street on 22nd Street, as follows: a pipe installed in 1934 failed in 1940; four pipes installed in 1934 failed in 1941; and a pipe installed in 1934 failed in 1942 [R. 45-52, 280, 281].

In the ten-inch line on Signal Street, the Water Department has experienced only one rupture, and that from a cracked pipe, in 1949 [R. 257].

The City's answers to interrogatories propounded by plaintiff also disclosed that the Harbor Department of the City of Los Angeles, prior to March 12, 1956, had experienced two prior failures of cast iron water pipe due to corrosion *beneath the same building* on two specific occasions: (1) on February 15, 1954, a section of five-inch cast iron bell and spigot water pipe was replaced, due to corrosion, at *Berth 60*, (which is part of the same building as *Berth 59*); (2) on October 11, 1955, a section of eight-inch cast iron bell and spigot water pipe was repaired, due to corrosion, at *Berth 59* [R. 157].

Over plaintiff's objections the City was permitted to put in evidence a later correction of this answer which claimed that the original answer was in error and that in fact neither of the breaks mentioned was due to corrosion [R. 162-165]. This aspect of the evidence is developed more fully in the portion of this brief dealing with the specification of error made in connection with the admission of such evidence.

In addition, a break due to corrosion in this same eight-inch line occurred in 1926 [R. 435].

**(g) Evidence of Contemporaneous Leakage From This System.**

The only outlets in this water system were overhead sprinklers and 36 fire hoses in the transit shed, 36 two-inch drain valves and 36 three-fourths inch inspector's test valves. There were no faucets, drinking fountains, toilets or other outlets of any kind [R. 201].

Mr. Berry, previously identified, testified that the piping to the sprinkler systems and the fire hoses are in

plain view; that in the three months prior to March 12, 1956, he had not observed any leakage from any of the above-ground facilities of the sprinkler or fire hose systems; and that he had never observed longshoremen spray water about the premises from the fire hoses connected to this system [R. 297].

Mr. Miretti, previously identified, testified that during his nine years of employment in the area, which included Berth 59 [R. 113, 114] he had not seen any water come from either the sprinkler system or the fire hoses nor had he seen any escaping water in the area [R. 121].

Mr. Brashier, defendant's plumber, testified that inspectors sometimes open the test valves; that longshoremen sometimes open the test valves "out of idle curiosity"; and that he has seen the fire hoses lying on the floor of the shed, wet. However, he did not testify that such conditions had been observed in the several months preceding this failure [R. 446, 447].

Each of the three By-Pass meters, sometimes called detecto meters, located near Berths 57, 58 and 60 on Signal Street, was read by an employee of the Department of Water & Power on January 7, 1956. Two of them were read on February 4, 1956. A third was read on February 9, 1956. And all three were read on March 1, 1956 [R. 218].

There was no evidence that any water was drawn from the 3,300 feet of system serviced by those meters for any reason during the period December 9, 1955, to March 1, 1956. The three detecto meters, however, recorded a flow of 11,576 cubic feet of water through the system during that period [R. 225, Exs. 21-27]. That is an average flow of 139.4 cubic feet per day, for which there was no explanation.

The three detecto meters were equally available for examination by Water Department customers, which, of course, would include the Harbor Department. The Harbor Department, however, did not read these meters at any time [R. 187, 278].

The Water Department rendered meter statements each month to the Harbor Department for each of the three connections. In several cases, these bills included the standard flat rate charge plus an additional charge for water used, based on the meter readings. The bills disclosed this flow for several months prior to the incident giving rise to damage [R. 224, Exs. 21-27].

Defendant's expert, Mr. Alderman, previously identified, testified that graphitic corrosion eventually goes through the thickness of the pipe and gives rise to leaks, which may be large or small. He admitted the existence of a leak in and of itself *is some evidence of possible corrosion* [R. 475, 476]. Mr. Alderman further testified that if you have a leak in a pipe you cannot tell whether the cause is graphitic corrosion or something else until you look at it [R. 476]. He also testified that the presence of moisture around the outside of a pipe would tend to accelerate the corrosive process [R. 471].

Mr. Alderman testified that where a rupture is caused by graphitic corrosion the leak "usually" will develop very fast, "over a period of time, days or *months*", and in this case the rupture "probably" increased in a matter of minutes to a large size break [R. 476]. He testified that the leakage in this case "probably" did not come from the particular rupture here involved. It is of course obvious, however, that smaller leaks along the pipe would be the best possible warning that replacement or an inspection might be needed, against the risk that larger breaks along the pipe line are incipient.

Mr. Brashier, previously identified, testified that he was “almost” positive that the water that went through the meters from January to March did not go out through the particular rupture which caused the damage here involved [R. 444].

Mr. Brashier further testified, however, that the fact that 100 or more cubic feet of water was going through these meters every day, was an indication that something *was seriously wrong* with the system [R. 441].

Mr. Alderman also testified that a leak of 100 cubic feet a day in the system of the size covered by the meters would be *excessive* and that *someone should have gone around to see where the water was going to or where it was coming from* [R. 478]. He conceded that it would have been possible to turn off different parts of the system to see whether or not a leak still occurred and thereby localize the area where the leak was occurring [R. 486]. In other words, it was possible for the City to shut off all the laterals and open them up one at a time, and thereby determine which lateral was defective. No one was of the opinion, or suggested that these leaks should have gone unattended and ignored, as they were.

**(h) Evidence as to Maintenance of the Pipe and Opinion.**

The City’s actual pattern of maintenance can be very briefly described. It is found (and with this finding we have no quarrel) that “. . . the City adopted a policy of not maintaining, repairing or replacing its buried water pipe lines until some trouble was reported or some evidence of leakage developed” [Finding No. 11, R. 102, 103]. Mr. Brashier also testified that no one in the Harbor Department read the meters which would, if read, have furnished evidence of leakage. Thus, the *only* evi-

dence of leakage which was treated as significant was the actual appearance of water on the surface. There were no other precautions against pipe failure taken!

(i) Testimony Regarding Desirability of Replacement of the Pipe.

Mr. James M. Montgomery, a consulting engineer specializing in water works problems, testified on behalf of plaintiff, that the pipe, as a matter of good engineering practice, should have been replaced long prior to 1956 [R. 305]. He testified that the reason for his opinion was that the pipe was not laid under a street where a break would cause mere inconvenience and delays in traffic movement but was under and adjacent to a building and warehouse where goods and merchandise would be subject to damage [R. 305].

More specifically, Mr. Montgomery testified that the pipe here involved should have been replaced as soon as the corrosive conditions of the soil were known, because a leak in cast iron pipe from graphitic corrosion ordinarily does not just leak, it breaks and assumes great proportions [R. 305]. He testified that the area of San Pedro harbor has been known in the engineering trade as a hot area, *i.e.*, a highly corrosive area, since the early 40's [R. 306] and that the pipe therefore should have been taken out some time between 1940 and 1945 [R. 324]. He further testified that a short length of pipe such as the service laterals here involved can be replaced quite economically [R. 305].

There was no contrary testimony, so far as concerns replacement merely of lateral pipes beneath buildings.

However, Mr. Ashline, one of the City's experts, testified that there is no practice generally prevailing in Southern California of digging up water pipes to inspect

them to see if they should be replaced [R. 259]. He added that there is no practice in the Water Department to dig into the ground to look at buried pipe unless it is suspected that something is wrong. He explained that the reason there was no such practice was that all of the pipe would have to be examined, as corrosion does not occur uniformly, for reasons previously indicated, and that therefore the cost of digging up the pipes "would be prohibitive" [R. 259]. Presumably, he referred to the cost of an entire water system, and not merely to laterals beneath buildings. Mr. Alderman's testimony was to the same effect.

To sum up: The evidence was substantially without conflict:

- (a) That this pipe was in highly corrosive soil.
- (b) That cast iron pipe has a bad record in such soil.
- (c) That the laterals extending under the transit shed, one of which failed, could have been replaced at moderate expense.
- (d) That in this soil, such pipe had a normal life of 20 years, which had long since passed.
- (e) That a substantial amount of water had been flowing through this pipe, and no one knew why.
- (f) That leakage itself is evidence of corrosion.
- (g) That, for economic reasons, the City had a policy of doing nothing about this pipe.

We have hitherto detailed the law describing the duty of a warehouseman, which is to take reasonable precautions to provide a safe warehouse. We submit that the facts detailed above show a total default in this respect. The cases cited below expand on the effect of this failure.

(j) Warehouseman's Burden of Proof.

Under the cases we have cited, in part I of this argument, the City was under a duty to keep its premises under repairs. On these facts, the proof is without contradiction that the duty was not performed; that on the contrary, in order to save money, a policy of *no* care was adopted.

Where there is proof that a casualty occurred, and no evidence that it occurred *despite* the exercise of due care, a warehouseman is liable for the damage resulting.

*Lawrence Warehouse Co. v. Defense Supplies Corp.*, 164 F. 2d 773 (C. C. A. 9th 1947); *California & Hawaiian Sugar R. Corp. v. Harris County, etc., Dist.*, 27 F. 2d 392 (D. C. Tex. 1928).

(k) Res Ipsa Loquitur Is Also Applicable.

Seldom is a situation encountered which fits so neatly and logically into the Doctrine of *res ipsa loquitur* as that which is presented in this case. The applicability of the doctrine to the bursting of water pipes has been recognized repeatedly by the courts of California. In

*Juchert v. California Water Service Co.*, 16 C. 2d 500, 106 P. 2d 886 (1940),

the defendant complained of an instruction given by the court as follows:

“I instruct you that when a thing which causes injury is under control and management of a defendant and the accident is such as in the ordinary course of things does not happen if those who have the management use ordinary care, it affords reasonable evidence in the absence of explanation by the de-

fendant, that the accident arose from want of ordinary care. Therefore if you find that the defendant water company had exclusive control and management of its water pipe, and that water was permitted to escape therefrom, then I instruct you that the escaping of said water from said pipe affords evidence in the absence of explanations, that it arose from a want of ordinary care on the part of said water company in the control and management of said pipe.’ ” 16 C. 2d at 513.

In holding the instruction proper, the California Supreme Court (as long ago as 1940) said:

“The courts in this state have often applied the doctrine of *res ipsa loquitur* in cases similar to, though not identical with this. . . .

“Certainly it would not extend the doctrine to say that it is a matter of common knowledge that in the ordinary course of things water mains do not break if those having the management thereof use proper care.

“. . . The doctrine has in fact been applied to bursting water mains in the cases of *Buffums’ v. City of Long Beach*, 111 Cal. App. 327 [295 Pac. 540] . . .

“We therefore hold that the instruction was proper.” 16 C. 2d at 514-515.

In the present case, there was no evidence that the City did anything to prevent the loss. On the contrary, there was evidence and a finding that the City had a policy of doing nothing, until water appeared on the surface. (*i.e.*, a policy of doing nothing until it was too late to prevent damage). There being *no* evidence that

the casualty occurred in spite of the exercise of due care to prevent it, plaintiff was entitled to judgment, for the presumption stands without rebuttal.

(1) **Breach of Duty to Acquire Knowledge.**

In his case, it is conceded that the Harbor Department, which maintained this pipe, did not inform itself either of the corrosivity of this soil, or the weakness of cast iron pipe in such soil [R. 274, 275, 284, 285]. This was so, although the maps and measurements of the Water Department which showed this condition, were available to them [R. 278].

Further, although the Harbor Department used leakage as the sole criteria in making repairs, it did not read the meters showing leakage [R. 187]. There was a leakage in excess of 130 cubic feet a day, enough to show something seriously wrong. We quote the testimony of Defendant's plumber, Charles V. H. Brashier [R. 441]:

"The Court: Would you consider the fact that a hundred cubic feet of water was going through these meters an indication something was seriously wrong with your system?

"The Witness: Yes, sir, if that occurred every day."

The authorities are clear that the City could not, without incurring liability for negligence bury its proprietary, municipal head in the blissful sands of ignorance. Its duty required it to keep abreast of all matters which might affect that operation. Thus, in

*Wright v. Southern Counties Gas Co.*, 102 Cal. App. 656, 667, 283 Pac. 823 (1929),

the court held that one under a duty to use care for which knowledge is necessary cannot escape liability for negligence because of voluntary ignorance, relying upon

*Gobrechet v. Beckwith*, 135 Atl. 20 (N. H. 1926), where the court had stated:

“Where a duty to use care is imposed and where knowledge is necessary to careful conduct, *voluntary ignorance is equivalent to negligence*.” (Emphasis added.) 135 Atl. at 22.

In the *Wright* case, the court also pointed out:

“. . . If the circumstances are such as to show that the owner [of premises], with reasonable diligence, might have become aware of the peril, or should have known the same, liability attaches. . . . It is also well settled that in actions based on negligence, that what an owner of premises reasonably should have known, he will be held to have known.” 102 Cal. App. at 661.

The extent to which the courts refuse to permit a party to hide under a blanket of ignorance is reflected by this Court’s language in

*States Steamship Company v. United States*, 259 F. 2d 458, 1957 AMC 2277 (C. C. A. 9th 1957).

There, in Footnote No. 4, the Court was considering evidence on the crack sensitiveness of certain types of vessels, and it commented upon the findings of a 1946 board of investigation convened by order of the Secretary of the Navy to inquire into “The Design and Methods of Construction of Welded Steel Merchant Vessels”, as follows:

“This whole report which had not only been read by Vallet but which must have been required reading

for all persons in the shipping industry having to do with ship maintenance, was sufficient to alert any reader to the necessity of care and caution in the handling of welded steel ships such as the Pennsylvania. . . . In short, it would appear from a reading of this and other available studies on the subject, that a maintenance executive in the shipping industry in the exercise of due diligence should be as concerned about the problems of likelihood of fracture or of crack sensitiveness in this type of vessel as were the experts who compiled these studies.” 259 F. 2d at 467.

The City, therefore, was under a plain continuing duty to acquire knowledge relating to the operation and maintenance of water pipes and then to apply that knowledge to the situation presented.

What then was the “knowledge” which the City should have acquired, and which if acquired and acted upon as it should have been acted upon by a reasonable person, would have protected the City from liability for negligence in this case? The nature and uncontroverted existence and availability of such knowledge is adequately reflected by the following facts established in this case:

(1) Considerable literature specifically on graphitic corrosion of unprotected cast iron pipe was available long before 1945 [R. 343, 344].

(2) The soil in the area of Berth 59 was highly corrosive [R. 335, 336].

(3) By the standards applied since the early 1940’s the subject pipe was “unprotected pipe” insofar as graphitic corrosion is concerned [R. 277, 278].

(4) Long before 1941 graphitic corrosion had been particularly troublesome in the Harbor area, and the Department of Water & Power knew in 1941 that the soil in the Signal Street area was highly corrosive [R. 292, 293; Ex. 29].

(5) The Department of Water & Power, within the general area here involved, had, prior to March 12, 1956, experienced numerous failures of cast iron pipe due to corrosion [R. 43-52, 238-240].

(6) Complete graphitization in certain places on the sand-molded, cast iron pipe laid in the soil in the area of Berth 59 could have been expected within 25 years from its installation, that is, by 1939 [R. 338-339, 401], and any person interested in corrosion could have known by 1935 that corrosive failure of the subject pipeline was "imminent" [R. 343].

In that behalf, we quote the similar testimony, first of the City's expert, Robert R. Ashline [R. 277]:

"Q. (By Mr. Verleger):

Further, Mr. Ashline, you said earlier in Philadelphia they had 150 years experience of life with pipe. Where you have pipe in highly corrosive soil, you do not expect any such life for the pipe, do you?

A. Well, generally not, but there are exceptions.

Q. There are exceptions, but generally you don't. Mr. Ashline, back in May, 1938, you prepared an article in the American Water, Journal of the American Water Works Association, on testing of soils prior to installation of metal pipes, and you prepared some charts on the life of pipe in years in corrosive soils where it is poorly protected, isn't that right?

A. That is poorly protected pipe?

Q. Yes, poorly protected or unprotected pipe in corrosive soils. A. Yes.

Q. The charts you prepared indicated a life of ten to perhaps twenty years for pipe in such soil?

A. That's right.

Q. Is that correct? A. Sometimes even less.”  
(Emphasis added.)

And, second, that of Plaintiff's expert, J. F. Brennan [R. 401]:

“Q. I want to get it clear, please. What is the testimony about this 25-year situation? A. I said that under the conditions that existed here at Berth 59, Pier 1, it was my opinion that the expectancy from the time of installation to complete graphitization in places, the spots on this pipe, would be 25 years.”

(7) Furthermore, if they had read the meters, they would have known that the pipe was leaking at a rate of well over 100 cubic feet per day [R. 440, 441].

(m) The City by and Through Its Water Department  
Acted Negligently.

Even if it is assumed, *arguendo*, that the Harbor Department was under no duty to inform itself, nevertheless the City, by and through its Water Department, was clearly negligent in not communicating its considerable fund of relevant knowledge to the Harbor Department, which department it knew, of course, was operating pipelines in the area of Berth 59.

The following information undeniably existed in the City's Water Department:

(1) Mr. Robert R. Ashline, the corrosion engineer employed by the Water Department since 1924, knew that for many years prior to 1956 the United States Govern-

ment publications and engineering literature, generally, contained information on corrosion [R. 245].

(2) The Water Department had for a long time been quite cognizant of corrosion problems; long before 1941 graphitic corrosion of cast iron pipe had been particularly troublesome in the Harbor area; and the Water Department knew in 1941 that the soil in the Signal Street area was highly corrosive [R. 245, 292, 293, 374, Ex. 29].

(3) The Water Department knew sometime subsequent to 1935 but many years prior to 1956 that the soil around Berth 59 and the surrounding area was severely corrosive, because it contained a good deal of salt [R. 247, Ex. 28-A].

(4) The Water Department had, within the area here involved, one mile inland of the pierhead lines established by the federal government at Los Angeles Harbor, experienced nine failures of cast iron pipe due to corrosion within 6 to 10 years after installation, and 29 failures of cast iron pipe due to corrosion within 11 to 20 years after installation [R. 43, 44, 238-240].

(5) The Water Department since 1935 determined the corrosivity of soil along the route it laid pipe, and the Water Department knew that in the case of severely corrosive soil, cement asbestos pipe generally should be used [R. 260, 283].

The Water Department, however, hoarded its great fund of general and special knowledge concerning the area of Berth 59 and the problems and dangers of sand-molded, cast iron pipe in highly corrosive soil, and negligently did not share the information with the Harbor Department, although it obviously knew that the Harbor Department maintained pipelines in the Harbor area. All this time it was sending bills showing a steady flow of water

in what was supposed to be an overhead sprinkler system with no such steady flow. Manifestly, in the light of its knowledge concerning the unexplained leakage in the Harbor Department's pipeline system, the Water Department also was negligent in not alerting the Harbor Department to a possible corrosion break in the line.

(n) The Court Erred in Treating the Custom of Municipalities, Founded Upon Economy, as the Standard. Evidence of "Custom" Does Not Justify the Conclusion That There Was No Duty to Maintain. The Evidence of Custom Does Not Meet Either the Defendant's Burden of Proof or the Burden of Rebutting the Presumption Under Res Ipsa. (Specification of Error No. 6.)

The City introduced testimony in the nature of custom evidence, which "evidence" obviously weighed heavily with the court in rendering its decision, for it said in its memorandum opinion:

"If any policy has been adopted by municipalities in California, the policy is the same as that followed by the City of Los Angeles; that is, that after cast-iron water pipe is installed the line is used without inspection or replacement until there are sufficient breaks to indicate the pipe has corroded or has become undependable." [R. 93].

This was, in point of fact, the *only* evidence offered by way of defense.

Does such a custom justify non-maintenance of leaking pipes in soil known to be corrosive, under a warehouse? Does it justify the conclusion of the Findings, that no duty to maintain these buildings, particularly the subject service laterals, in a safe condition existed?

A portion of such testimony was obtained from one of the City's experts, who testified as follows [R. 258, 259]:

"Q. Are you familiar with the practice generally prevailing in Southern California and elsewhere with reference to maintenance of water pipes? A. Yes, I am.

Q. Is there any practice that you know of for digging pipes up to inspect them to see if they should be replaced? A. No, sir.

\* \* \*

Q. There is then, I take it, no practice to dig down into the ground to look at buried pipes unless you suspect something wrong? A. That's right."

The "practice" referred to in that testimony does not support the findings that the City had no duty to maintain the subject service laterals in a safe condition. It is settled that conformity by a party to a general custom with relation to the manner of maintaining certain equipment does not excuse the party unless the practice is consistent with due care.

*Complete Ser. Bur. v. San Diego Med. Soc.*, 43 C. 2d 201, 214, 272 P. 2d 497 (1954);

*Polk v. City of Los Angeles*, 26 C. 2d 519, 159 P. 2d 931 (1945).

The following quotation from

*Sheward v. Virtue*, 20 C. 2d 410, 414, 126 P. 2d 345 (1942),

succinctly states the governing principles:

"In *Robinet v. Hawks*, 200 Cal. 265, 274 (252 Pac. 1045), this court said that the doctrine of customary usage *does not apply to the question of legal duty* under the law of negligence, or that the con-

tinuance of a careless performance of a duty would transform a party's negligence into due care. Likewise in *Anstead v. Pacific Gas & Electric Co.*, 203 Cal. 634, 638 [265 Pac. 487], a like contention was answered, with citation of authorities, by the statement that the general practice or customs would not excuse the defendant's failure unless it was consistent with due care. More recently in *Mehollin v. Ysuchi-yama*, 11 Cal. 2d 53, 57 [77 P. 2d 855], this court said that one may not justify a failure to use ordinary care by showing that others in the same business practiced a similar want of care." (Emphasis added.) 20 C. 2d at 414.

It is important to note at the outset that Ashline's testimony deals only with the "practice generally prevailing . . . with reference to maintenance of water pipes". It does not come to grips with the real issue here: the practice with reference to maintenance of water pipes so located as to cause substantial damage to valuable goods in the event of a rupture. Moreover, and of equal importance, the testimony is only that there is no practice to dig pipes up to inspect them; it is not that there was not a practice to replace such cast iron pipe laid in highly corrosive soil at a time when the risk of damage to property was too great to justify continued use of the pipe. The highly relevant character of this distinction is forcefully illustrated by the testimony of Mr. Montgomery, one of plaintiff's experts, who testified that the pipe should have been replaced prior to March, 1956 [R. 304, 305], and who when asked to state the reasons for that opinion, replied:

"The reason I think it should have been replaced is that it is in effect the same as a service line. It

is a line which brings water into the building for fire protection purposes. It is unlike similar cast iron mains laid under the street where a break in the line would simply cause inconvenience, as a rule, and delays in traffic movement. In a building or a warehouse where goods are subject to damage, I feel just a short length of service pipe should be replaced. It can be done quite economically. Knowing the soil is corrosive, I think it should have been replaced.” [R. 305].

This testimony was adhered to on cross-examination [R. 323, 324].

The record in this case discloses an additional reason for rejecting the applicability of the so-called “custom evidence” introduced by the City in purported justification of its custom. The “custom” (if it can be called that) of not digging up water pipe lines until trouble developed, rests on the basis that “it is more economical to pay the resulting damage than go in.” (Brennan [R. 369], describing P. G. & E. practice.) Under the authorities developed in Part IV of this brief, a custom based on pure considerations of economy is not relevant on the issue of negligence. Nor, even if the evidence of custom lacked this deficiency, would such evidence dispell the inference raised by *res ipsa*.

The Court will recall that the *Juchert* case (16 C. 2d 500, 106 P. 2d 886 (1940)) holds that breaks in water pipes do not ordinarily happen in the absence of someone’s negligence; hence that *res ipsa* applies when a break occurs. In view of this holding, it would seem to be the law that just to await breaks, without trying to prevent them, is necessarily negligence. This being the rule, ad-

herence to this utility practice constitutes *prima facie* proof of negligence, which is all the City has given us.

The City was required affirmatively to rebut the inference of negligence which arose under the facts in this case. As stated by the California Supreme Court in *Burr v. Sherwin Williams Co.*, 42 C. 2d 682, 268 P. 2d 1041 (1954):

“It is our conclusion that in all *res ipsa loquitur* situations the defendant must present evidence sufficient to meet or balance the inference of negligence, and that the jurors should be instructed that, if the defendant fails to do so, they should find for the plaintiff.” 42 C. 2d at 691.

So much for the custom. The fact that non-maintenance may be customary does not exonerate it. Is there anything in the fact that non-maintenance is a deliberate economic decision, which prevents liability from arising? This question, as much as anything else, seems to have bothered the Trial Court. We pass to that next.

#### IV.

**The Decision Not to Maintain Should Be Treated as an Election to Accept Responsibility for Damages Rather Than an Excuse. It Was Error to Treat This Practice as an Excuse From Liability. (Specifications of Errors Nos. 5, 7, 8.)**

This custom of non-repair was an attempt, for profit, to place the risk of loss solely on the users, not the owners, of the warehouse. Where injury to property, rather than person is the risk, from a strictly selfish point of view it may be cheaper for a warehouseman or a public utility to maintain its property in a dangerous rather than a safe condition. Thus, if the warehouse roof leaks only a little,

the value of a little spoiled merchandise may be less than the cost of a new roof. And therefore, even though the warehouseman is under a duty to exercise due care to keep his premises, he may quite wisely, and quite deliberately leave a leaking roof or a leaky pipe in place.

One then meets the question—How can a deliberate, advised decision, be negligence? This, perhaps more than anything else, seemed to bother the Court.

The Court appears to have felt that the adoption of a deliberate policy of non-maintenance, for reasons of economy, could not constitute negligence, because the decision was not unreasonable from the point of view of the pipe operator, even though the effect was to shift the risk of harm entirely to innocent third parties. Thus, as soon as the practice of non-repair was developed, *the Court raised the question of absolute liability* [R. 369-371]. And, at the conclusion of the case, prior to the commencement of oral argument, the same question was raised by the court [R. 487, 488]. The Court spent a good deal of its opinion discussing absolute liability.

The inquiry concerning absolute liability in a sense, touched close to home. For implicit in a decision not to maintain, where there is a duty to maintain, there must be an assumption of liability.

This was recognized quite explicitly by one of the principal witnesses concerning the custom of non-maintenance. Mr. J. F. Brennan, Depreciation Engineer for the Pacific Gas & Electric Co., explained that the practice in the industry was not to inspect or to replace pipes, even though their estimated life had expired, because to quote the witness [R. 369]:

“We accept those hazards usually because it is more economical to pay the resulting damage than to go in.”

As a matter of common sense, this is not hard to follow. One has a duty; one neglects it because it is cheaper to pay claims than to perform. This is perfectly reasonable, so long as one pays the claims. The only problem is one of legal theory. If it is "reasonable" not to "go in", why then is it negligent and why should one pay claims?

The answer follows from the nature of the standard. Prosser expresses it quite clearly in Prosser, *Law of Torts* (2d Ed., 1955) at 119, 120:

" 'Negligence is conduct, and not a state of mind.' [Quoting Terry, *Negligence*, 1915, 29 Harv. L. Rev. 40.] In most instances, it is caused by heedlessness or carelessness, which makes the negligent party unaware of the results which may follow from his act. But it may also exist *where he has considered the possible consequences carefully, and has exercised his own best judgment*. The standard imposed by society is an external one, which is not necessarily based upon any moral fault of the individual; and a failure to conform to it is negligence, even though it may be due to stupidity, forgetfulness, an excitable temperament, or even sheer ignorance. The almost universal use of the phrase "due care" to describe conduct which is not negligent, should not be permitted to obscure the fact that the real basis of negligence is not carelessness, but behavior which should be recognized as involving *unreasonable danger to others*." (Emphasis added.)

Negligence is behavior which involves an unreasonable risk of harm *to others*. The words "to others" are crucial.

This is a test which requires one to consider *not the cost to oneself, but the hazard to third parties*. The Re-

*statement of the Law of Torts*, Section 283, Subparagraph d., articulates this principle with definiteness. We quote:

“d. *Reasonable consideration for others and reasonable prudence.* In so far as the conduct of the reasonable man furnishes a standard by which negligence is to be determined, the standard is one *which is fixed for the protection of persons other than the defendant . . .* Where a defendant’s negligence is to be determined, the “reasonable man” is a man who is reasonably “considerate” of the safety of others and *does not look primarily to his own advantage.*” (Emphasis added.)

Analyzed in this light, the deliberate decision on economic grounds, not to care for the goods entrusted to defendant, is by definition a failure to meet the standard. The defendant has looked *exclusively* to his own interest, and ignored completely, the risk to the goods he is bound to protect. This point of view was expressed long ago in California by the decision in,

*Redfield v. Oakland C. S. Ry. Co.*, 112 Cal. 220,  
43 Pac. 117 (1896),

where the court upheld the rejection of expert testimony on the general custom as to the number of men used in operating an electric street railway car, stating:

“But, . . . custom may originate *in motives of economy, or the stress of pecuniary affairs*, or in recklessness, and not from considerations based upon the proper discharge of their duty toward others using their cars.” 112 Cal. at 224, 225.

Custom is ordinarily evidence on the question of due care. Under the *Redfield* case, a custom founded on the defendant’s economy and convenience was not such evidence. That is precisely the sort of custom we have in the case now before the Court.

Were it otherwise, the obligation to repair the warehouse roof would cease, if the warehouse were an old one, and repairs unprofitable. The obligation to have good brakes and tires on an old car would vanish, when the car was depreciated to a value less than the cost of the tires and brakes. The standard has to be, as it is, danger to the invitee, not profit to the warehouseman. This being so, a decision not to perform the duty to repair is necessarily a willing (or perhaps unwilling) acceptance of liability.

It is worth noting, before leaving this subject, that this deliberate decision not to perform is as close to an intentional as to a negligent harm.

We all know that a person is deemed to intend the consequences he knows will result from his acts. Thus, the deliberate doing of an act which will, either certainly, or very probably, result in harm, is characterized as wilful misconduct—a sort of semi-intentional tort, for which liability exists under guest statutes, *Walker v. Bacon*, 132 Cal. App. 625, 23 Pac. 2d 520 (1933); against which contractual limitations of liability are invalid, *Donnelly v. Southern Pacific Co.*, 18 C. 2d 863 (1941); and which are not discharged in Bankruptcy, *Ex parte Cote*, 106 Atl. 519, 93 Vt. 10 (1918). The deliberate decision not to maintain seems to fall in this category, for the inevitable result is periodic failures which will certainly cause injury to someone.

Whether this custom of non-maintenance be treated as wilful—as an intentional decision to injure third parties from time to time, because this is cheaper—or as a simple failure to comply with the duty of a warehouseman, is immaterial. In either event, we submit, it is hardly a justification against liability.

V.

**Any Determination That the City's Conduct Was Not Negligent Under Principles Applicable to the City Even If It Be Assumed It Was Acting in a Government Capacity, Were Clearly Erroneous. (Specification of Error No. 4.)**

Actually, even if it be assumed, *arguendo*, that the governmental standard of care was the applicable standard, the court clearly should have found that the City acted negligently in discharging its duty of care with respect to plaintiff's goods.

The statute which prescribes the controlling standard of conduct for a local agency such as a City when acting in a governmental capacity, is Government Code, § 53051, which provides as follows:

"A local agency is liable for injuries to persons and property resulting from the dangerous or defective condition of public property if the legislative body, board, or person authorized to remedy the condition:

(a) Had knowledge or notice of the defective or dangerous condition.

(b) For a reasonable time after acquiring knowledge or receiving notice, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition."

The first inquiry, therefore, is whether the pipeline which burst constituted a "dangerous or defective condition". Where a condition involves an unreasonable risk of injury to the public, the condition is dangerous or defective, under the Public Liability Act.

*Hawk v. City of Newport Beach*, 46 C. 2d 213, 217, 293 P. 2d 48 (1956).

Here, it is apparent that permitting this pipeline to remain in corrosive soil at a location where if it burst valuable goods would be damaged, involved not merely an “unreasonable risk”, but an ultimate certainty of injury to goods stored in the transit shed. Further, as stated in

*Carr v. City & County of San Francisco*, 170 Adv. Cal. App. 54, 338 P. 2d 509 (1959):

“The dangerous or defective condition to satisfy this section [Government Code, § 53051] may be found in the general plan of operation.” 170 A. C. A. at 58.

The “general plan of operation” in this case was not to inspect or replace underground pipe until some trouble was reported or some evidence of leakage developed [R. 143, 144, 150]. Nor did the maintenance policy include an effort to determine the reasonable life of the pipe installed beneath Berth 59 [R. 157]. Such deficiencies in the maintenance and operation of the pipeline in and of themselves constituted a “dangerous or defective condition” within the meaning of Section 53051.

Furthermore, it is irrelevant that the installation of this pipeline in 1914 was not in and of itself negligent conduct.

*Barrett v. City of Claremont*, 41 C. 2d 70, 73, 256 P. 2d 977 (1953).

This was stated in similar terms in

*McAtee v. City of Marysville*, 111 C. A. 2d 507, 244 P. 2d 936 (1952),

where the court said:

“For it can make no difference whether an inherently dangerous condition is present when the improvement is completed according to plan, or whether

that inherently dangerous situation arises through change of circumstances, which, to the knowledge of the city, renders the design unfit for the continued use being made of the improvement. It is not unreasonable to charge responsible officials of a city with knowledge that conditions have so changed, and that an originally safe plan of improvement has become an inherently dangerous one." 111 C. A. 2d at 513.

The next inquiry is whether the City had the requisite "knowledge or notice" under Section 53051.

The authorities make it clear that the governmental activity standard of care does not require actual knowledge of a dangerous or defective condition before liability can be imposed; it is well established that constructive knowledge of such a condition suffices if the defect is such that it should be reasonably anticipated by the officers in charge, or when reasonable inspection would have disclosed the dangerous condition.

*Kirack v. City of Eureka*, 69 C. A. 2d 134, 140, 158 P. 2d 270 (1945);

*Fackrell v. City of San Diego*, 26 C. 2d 196, 206, 157 P. 2d 625 (1945).

As stated in the *Fackrell* case:

"Constructive notice is defined by section 19 of the Civil Code as that knowledge of circumstances 'sufficient to put a prudent man upon inquiry as to a particular fact' where 'by prosecuting such inquiry he might have learned such fact.' The rules governing constructive notice require reasonable diligence in making inspections for the discovery of unsafe or defective conditions. [Citations omitted.] Where

the authorities who have planned and constructed an improvement have knowledge of circumstances which reasonably might be expected to result in a dangerous condition as a natural and probable consequence of the work, such authorities are put upon inquiry, and it follows that it is incumbent upon them to make inspections commensurate in scope with the nature and character of their knowledge and the peril which should be avoided" 26 C. 2d at 206.

With respect to the final requirement of liability under the governmental standard, it is clear that the City, long after 1945 (or earlier), when they were charged with notice of this dangerous condition, [R. 143, 144, 150], failed to remedy the condition or to take any action reasonably necessary to protect the public against the condition. The City continued its "do nothing" policy of waiting for further trouble to appear [R. 157]. Inevitably, appear it did, and plaintiff's goods were damaged as a direct consequence.

## VI.

**The Court Erred in Admitting Over Plaintiff's Objection and in Failing to Strike From the Record Upon Motion an "Additional" Answer Given by the City to an Interrogatory Propounded to it by Plaintiff Pursuant to Rule 33 of the Rules of Civil Procedure. (Specification of Error No. 9.)**

Plaintiff's final specification of error relates to the patent and reversible error committed by the Court's admission in evidence of a so-called "additional" answer given by the City to an interrogatory propounded to the City by plaintiff pursuant to Rule 33 of the Rules of Civil Procedure.

The City's original answer to Plaintiff's Interrogatory No. XIV (b) was put in evidence by plaintiff [R. 156, 157]. It stated in part that the Harbor Department of the City of Los Angeles, prior to March 12, 1956, had experienced a failure of cast iron water pipe due to corrosion on two specific occasions—one approximately fourteen years after its installation and the other approximately fifteen years after its installation: (1) on February 15, 1954, a section of five-inch cast iron bell and spigot water pipe was replaced, due to corrosion, at Berth 60; and (2) on October 11, 1955, a section of eight-inch cast iron bell and spigot water pipe was repaired, due to corrosion, at Berth 59.

Over plaintiff's objection that such evidence was inadmissible in the City's behalf because it was "self-serving" [R. 162, 163], the City was permitted to put in evidence [R. 163, 164] a later and "additional" answer to the said interrogatory, No. XIV (b), which answer was contained in a document, entitled, "Additional Answers to Interrogatories Numbered VIII, XIII, XIV, XVI, and XVII, Submitted by Defendant City of Los Angeles as Required by Court Order Made February 25, 1957."<sup>1</sup>

Said "additional" answer claimed that the original answer was in error and that in fact neither of the breaks

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<sup>1</sup>Although it obviously does not bear upon the merits of this specification of error, it should be pointed out that the Court order made February 25, 1957, did not require the City to restate its answer made to Interrogatory No. XIV [b] solely with respect to the Harbor Department. It, in effect, required only that the answer be supplemented in order that there be a complete answer with respect to The City of Los Angeles in all its departments. [R. 40.] Nor, except in this one instance, did the City's other "additional" answers include information supplied by the answers previously given with respect to the Harbor Department, and these other "additional" answers were subscribed and sworn to only by Mr. Robert R. Ashline of the Department of Water and Power [R. 40-56].

was due to corrosion [R. 163, 164]. After the answer was read in evidence, plaintiff's motion to strike the evidence on the ground that it was "self-serving" was promptly denied [R. 164, 165].

The authorities are unanimous in holding that such evidence is inadmissible on behalf of the answering party because it is self-serving.

*Haskell Plumbing & Heating Company v. Weeks*,  
237 F. 2d 263, 267 (C. A. 9th 1956);

*Bailey v. New England Mut. Life Ins. Co.*, 1 F.  
R. D. 494, 495 (S. D. Cal. 1940).

In the *Haskell* case this court specifically so held. In that case plaintiffs acquiesced in the trial court's suggestion that they put in evidence their several answers given to interrogatories propounded under Rule 33. Defendant objected to such evidence. In holding the admission to be clear error, and in reversing the judgment because of the error, this Court said at page 267:

"The rules of evidence would permit answers such as these to be used against the party giving them, but because they are self-serving they should not have been admitted on behalf of these plaintiffs. *Lobel v. American Airlines*, 2 Cir., 192 F. 2d 217, 221. See 4 *Moore's Federal Practice* (1950 ed.) §33.29."

The chief vice, of course, inherent in the admission of such self-serving evidence in behalf of the answering party, is that it admits hearsay evidence.

*Caplan v. Caplan*, 142 Atl. 121, 127-28 (N. H. 1928);

McCormick, *Law of Evidence* (1954) at 588.

Wigmore supplies a good working definition of the hearsay rule, explaining its benefits, as follows:

“Under the name of the Hearsay rule, then, will here be understood that rule which prohibits the use of a person’s assertion, as equivalent to testimony to the fact asserted, unless the assertor is brought to testify in court on the stand, where he may be probed and cross-examined as to the grounds of his assertion and of his qualifications to make it.”

*V. Wigmore on Evidence* (3d ed. 1940) at 9.

The prejudicial nature of this improperly admitted evidence is manifest. The City’s original answer to the interrogatory was important additional evidence establishing that the Harbor Department of the City (as well as its Water Department) actually knew that corrosion was occurring in pipes in the area of the pier on which Berth 59 was situated.

It would appear that this additional answer completely destroyed the effect of the original answer, for the court found that paragraph IV of the Third Cause of Action alleging the City knew and had notice of the defective condition of the pipelines to be untrue. [Finding No. 22, R. 105]; and that paragraph V of the Third Cause of Action, alleging the City knew or had notice or should have had knowledge or notice that the eight-inch pipe line was subject to deterioration and failure from graphitic corrosion was untrue [Finding No. 23, R. 105]. Thus, not only did the erroneous admission of this self-serving hearsay evidence affect plaintiff’s theory of liability on principles of negligence applicable to a proprietary activity, but it worked against plaintiff even as to the lower standard of care applicable to a governmental activity.

By admitting this self-serving hearsay evidence on behalf of the City, plaintiff was deprived of the valuable right of probing and cross-examining the declarant as to the grounds for the assertion and of his qualifications to make them.

### Conclusion.

It is our belief that, if the Court agrees with the contentions we have made herein, that a proper order would be to direct the entry of judgment for plaintiff. We say this because it seems to us clear that further trial would add no additional illumination. Both the City's obligation, and their inactivity with respect thereto, are not disputable. The City's policy of non-maintenance is established by its own witnesses. Assuming that it was under an obligation to provide a reasonably safe place for plaintiff's goods, it would seem that liability should follow without question.

Respectfully submitted,

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October 15, 1959

## Appendix A.

### EXHIBITS OF RECORD

<u>Exhibit Number</u>		<u>Page of Record</u>		
		<u>Identified</u>	<u>Offered</u>	<u>Received</u>
Plaintiff's	1	111	419	419
	21	225	223	225
	22	225	223	225
	23	225	223	225
	24	225	223	225
	25	225	223	225
	26	225	223	225
	27	225	223	225
	28	240	240	240
	28-A	241	241	241
	29	373	374	374
Defendant's	B	121	423	423
	C	121	—	—
	G	202	202	202
	G-1	209	216	216
	G-2	216	216	216
	G-3	459	459	459
	I	251	255	256
	K	265	266	266
	N	404	405	406
	O	423	423	423
	P	423	423	423
	Q	424	423	424
	R	424	424	424
	S	426	427	427
	T	429	487	487
	U	430	432	432

